

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL
OF
ALABAMA
For the Period
July 1, 1947
Through September 30, 1947
Volume No. 48

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attoreny General from July 1, 1947, through September 30, 1947.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report to be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,

Attorney General.

**QUARTERLY REPORT
OF THE
ATTORNEY GENERAL**

Published by
WALKER PRINTING COMPANY
Printers and Stationers
Montgomery, Ala.

OPINIONS

July 3, 1947.

Hon. J. S. Freeman, Chairman,

Board of Revenue,

Walker County,

Jasper, Alabama.

Old Age Assistance—Hospitalization—Department of Public Welfare—Title 49, Section 49, Code of Alabama 1940, Act No. 1, General Acts 1943, page 1, Title 42, U. S. C. A., Section 303.

1. Title 49, Section 49, Code of Alabama 1940, authorizes grant to old age recipient in excess of maximum grant otherwise available in cases of hospitalization.

2. Old age assistance grant in hospitalization cases in excess of maximum assistance grant otherwise allowable is derived solely from state and local funds.

3. Old age assistance grants are payable to "needy persons" or "needy individuals" and not to persons performing services for such individuals.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of February 20, 1947, is as follows:

"Under the Old Age Assistance Statute, being Section 33 to 51 of Title 49 of the Code, there are provisions made for Old Age Assistance. Section 49 of Title 49 provides that in the event an applicant or recipient of assistance under that statute is so physically incapacitated that it is necessary for him to be sent to a hospital the County Department of Public Welfare is authorized to secure hospitalization for such person 'even though the amount to be expended exceeds the maximum assistance grant allowable to the applicant hereunder.' I cannot understand how Section 49 can mean anything less than that the County Department must, in case of such hospitalization, apply toward the expense thereof the amount of the grant to the person hospitalized and that the County Department cannot be required to pay any except the excess during the hospitalization. In other words, it seems that the statute means that the County Department must first apply the allotment to the payment of hospitalization before making any further grant.

"My construction of the statute seems to be emphasized by the fact that while a person receiving old age assistance is in the hospital he has no living expense and during the period of hospitalization it

cannot be intended by the law that the Welfare Department support him and also give him money to save."

The Statute, Title 49, Section 49, Code of Alabama 1940, referred to in your inquiry is as follows:

"Applicants hospitalized.—In the event an applicant or recipient of assistance hereunder is so physically incapacitated that it is necessary for him to be hospitalized, the county department is authorized to make such arrangements as are necessary to secure such hospitalization even though the amount to be expended exceeds the maximum assistance grant allowable to the applicant hereunder. The county department may make contracts for this hospitalization with any public or private institution or person."

This section allows the Department of Public Welfare to pay an old age recipient, when he is hospitalized, a grant which exceeds the "maximum assistance grant allowable."

At the present time, federal appropriations are available for matching state and local funds for old age assistance only when the grant to the individual is forty-five dollars or less. Title 42, U. S. C. A., Section 303, as amended August 10, 1946, c. 951, Title V, Section 501, 60 Stat. ——. Any grant to a recipient hospitalized above this forty-five dollars must come from state and local funds. The State law requires that the State and county must contribute equally to the payment of old age assistance grants and that such State and county funds shall be used to meet federal matching in the most advantageous proportion permitted by law. Title 49, Section 46, Code of Alabama 1940. If the grant to an individual exceeds \$45.00 and the excess is made up wholly of State and county funds, the State and county funds in such case would not be used in the most advantageous proportion, because federal matching would not be available with respect to such excess. A grant derived from State and local funds in excess of \$45.00 would, therefore, be a violation of Section 46, *supra*, were it not for Section 49, *supra*, which makes an exception as to the maximum grant in cases of hospitalization.

Section 49, *supra*, recognizes the fact that when an old age recipient is hospitalized his need for funds may increase to such an extent that a grant of \$45.00 per month may not be sufficient even though his ordinary living expenses may decrease. In such case, Section 49, *supra*, allows the grant, during the period of hospitalization, to be increased over and above the "maximum grant allowable" (forty-five dollars). For the reasons previously stated the excess over forty-five dollars must come solely from State and local funds. In such cases, more local funds (and more State funds) are expended in hospitalization cases.

All grants for old age assistance are based on need and in the case of hospitalization, this item of expense is merely one expense to be considered in establishing the recipient's need. When a recipient is hos-

pitalized, proper procedure requires that his need be reviewed in view of his changed economic condition. During this process, any living expenses not needed during hospitalization should be taken into consideration. Manual for Administration of Public Assistance, May 1, 1944, p. 34 (Rules and Regulations promulgated under authority of Title 49, Section 45, Code of Alabama 1940).

A grant made to a recipient for old age assistance, even when such grant is based on need for hospital expenses, is not paid to the hospital by the Welfare Department but to the individual recipient. Both State and federal old age assistance laws require that the grant be paid to a "needy person" or "needy individual" and not to another who performs services for such needy person. Act No. 1, General Acts 1943, p. 1, approved May 13, 1943; Title 42, U. S. C. A., Section 303, as amended August 10, 1946, c. 951, Title V, Section 501, 60 Stat. ———. The statute referred to in your inquiry, therefore, should not be so construed as to obligate the Welfare Department to pay the grant to the hospital. The grant must be paid to the individual who should then pay the hospital.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 11, 1947.

Hon. J. V. Chambers,
Judge of Probate,
Chambers County,
LaFayette, Alabama.

Title 12, Section 12, Code of Alabama 1940—Court of County Commissioners—Rental of office space in county courthouse.

Courts of county commissioners have the right to lease office space in the county courthouse only when and so long as said office space is not needed for county purposes.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of June 5, 1947, is as follows:

"Does the Commissioners' Court of Chambers County, Alabama, have the authority to evict from offices in the Court House a firm of lawyers who are occupying offices under the following circumstances:

"The offices in question have been used for a long period of years as the office of the County Solicitor or Deputy Solicitor. The present members of this firm entered into occupancy in 1938 when one of the members of the firm was appointed County Solicitor. This firm has remained continuously in occupancy of these offices since that time, and one or the other of the two partners has been in the capacity of County Solicitor of Chambers County.

"The minutes of a regular meeting of the Commissioners' Court held July 8, 1946, has the following entry:

" 'Upon motion of E. A. Hawkins (commissioner), seconded by H. B. Walton, the Court voted to lease to _____ & _____ the office space now occupied by them for ten years at \$12.00 per month, and the Judge of Probate is hereby authorized to execute a written lease in the proper form for said County. Said lease to begin Jan. 15, 1947, and extend to Jan. 15, 1957.'

"The Minutes of the Commissioners' Court held December 17, 1946, have an entry which reads as follows:

" 'LEASE

" 'STATE OF ALABAMA

" 'CHAMBERS COUNTY

" 'This lease, made this the 31st day of December, 1946, by and between Chambers County, Alabama, party of the first part, hereinafter called the lessor and _____ and _____, Attorneys at Law, LaFayette, Alabama, parties of the second part, hereinafter called the lessees:

" 'WHEREAS, the Commissioners' Court of Chambers County, Alabama, at a regular meeting of said Commissioners' Court held July 8, 1946, adopted the following resolution in words and figures:

" _____ and _____ Office Rental

" "Upon motion of E. A. Hawkins, seconded by H. B. Walton, the Court voted to lease to _____ & _____ the office space now occupied by them for ten years at \$12.50 per month, and the Judge of Probate is hereby authorized to execute a written lease in the proper form for said County. Said lease to begin January 15, 1947, and extend to January 15, 1957."

" 'Sand resolution being recorded in Volume 13, Minute Commissioners Court, Page 77 in office of the Judge of Probate, Chambers County, Alabama, therefore,

" 'Witnesseth, that the lessor does hereby rent and lease unto the lessee the following premises in Chambers County, Alabama, to-wit:

the office space now occupied by _____ and _____, Attorneys at Law, LaFayette, Alabama, located upstairs on the east side of the Courthouse adjoining the upstairs porch on the east side of said Courthouse, situated in LaFayette, Chambers County, Alabama.

"For occupancy by the lessee as a law office and not otherwise, for and during the term of ten years, to-wit: from the 15th day of January, 1947 to the 15th day of January, 1957, and covenant to keep the lessee in possession of the premises during said term.

"In consideration whereof, the lessee agrees to pay the lessor for the same \$12.50 per month, beginning the 15th day of January, 1947, being at the rate of \$150.00 per annum. Should the lessee fail to pay the rents as they become due as aforesaid, or violate any other condition of this lease, the lessor shall then have a right, at its option to re-enter the premises and annul this lease. And in order to entitle the lessor to re-enter it shall not be necessary to give notice of the rents becoming due and unpaid, or to make any demand for the same, the execution of this lease, signed by the lessee, which execution is hereby acknowledged, being sufficient notice of the rents being due, and of the demand for the same, and shall be so construed, any laws, usage or customs to the contrary, notwithstanding; and this lease being terminated, to surrender quiet and peaceable possession of said premises in like good order as at commencement of said term, natural wear and tear excepted. And as a part of the consideration of this lease, and for the purpose of securing to the lessor prompt payment of said rent as herein stipulated, or any damage that the lessor may suffer, either by failure to surrender quiet and peaceable possession of said premises as aforesaid, or any damage whatever that may be awarded said lessor under this contract, for said lessee hereby waives all right, which they may have under the Constitution and laws of the State of Alabama to have any of the personal property of the lessee exempt from levy and sale or other legal process.

"It is hereby further agreed that if the lessee shall continue on said premises, or any part thereof, after the termination of this contract, then this contract shall continue in full force under all the terms, conditions and covenants hereinabove set out.

"In testimony whereof we have hereunto set our hands and seals this the 31st day of December, 1946.

Chambers County, Alabama L. S.

By: J. C. Grady Judge of Probate
Lessor

By: _____ & _____ L.S.

Lessee

Witness:
Eloise R. McClendon'

"At the time this lease was entered into with the County, one of the members of this firm of lawyers was employed and paid by the County as County Solicitor, and served in such capacity until January 20, 1947, which was five days after the lease became effective. At the time this lease was made by the Commissioners' Court, there was surplus office space in the County Courthouse, and there is none at the present time. At the time this lease was entered into, the Commissioners' Court was renting offices outside the Courthouse for the County Surveyor, the County Welfare Department, the County Health Department, and the AAA. The County at the present time is still renting these offices outside the Courthouse.

"The firm of _____ and _____, Attorneys at Law, LaFayette, Alabama, on January 15, 1947, paid into the County Treasury \$150.00, one year's rent in advance.

"The Commissioners' Court now desires to provide office space for the present County Solicitor, but there is no space presently available within the Courthouse."

It is my opinion, under the facts stated, that the Commissioners' Court of Chambers County has legal grounds for the recovery of the control and possession of the property referred to.

Courts of County Commissioners are created by statute and can exercise only such powers as are conferred upon them by statute. Title 12, Section 12, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, approved July 6, 1945, at subsection 1 thereof, reads as follows:

"1. to direct and control the property of the county as it may deem expedient according to law, and in this direction and control it has the sole power to locate the courts in the rooms of the courthouse and to designate the rooms to be occupied by the officers entitled to rooms therein, including the circuit judge, if resident in the county, and to change the location of the courts, and the designation of the rooms for officers as it may deem best and most expedient, and this shall be done by order of the court entered upon the minutes of the court at a regular term of court. In the event the courthouse is inadequate to supply office rooms for such officers, the court may lease such office rooms in a convenient location in the county site and to pay the rental from the county fund."

In an interpretation of this statute this office in Quarterly Report of Attorney General, Vol. 18, page 343, rendered an opinion holding that "when the rooms in the courthouse are not needed for county purposes, the county governing body has full authority to rent such rooms to private individuals." Cited as authority for this proposition of law is the case

of *Corning v. Patton*, 236 Ala. 354, 182 So. 39. A pertinent quote from the *Corning Case*, *Supra*, is as follows:

"* * * it would be an anomaly to hold that when the lawmakers gave the commission the general control of county property that they could not rent or lease it when a sale of same was not advisable and it was no longer needed or used for county purposes."

However, it is specifically noted that the decision referred to is couched in careful language, to-wit, "(when) * * no longer needed or used for county purposes." Similarly, the opinion of the former Attorney General uses the language, to-wit, "When the rooms in the courthouse are not needed for county purposes * * *." The opinion referred to goes further and states:

"It is evident that when the space in the courthouse is needed for county purposes, no authority to continue renting such space to individuals exists. *Jackson v. Ball*, 211 Ala. 273, 100 So. 327." (Emp. Supplied).

The Supreme Court in the *Jackson Case*, cited *Supra*, held in part as follows:

"We think, however, and so hold, that the general control is broad enough to cover the right to rent or lease the same, within the legal limitations, so long as the county is not in the actual need of same for county purposes." (Emp. Supplied).

While the decisions referred to do not specifically discuss the point here in issue, it seems clear to me that the language used by our Supreme Court indicates that rooms in a county courthouse may be leased by the county governing board only when and so long as such rooms are not needed for county purposes. This is not true in the instant case according to the facts presented. As stated, office space in the county courthouse is currently needed.

The recent Supreme Court Case of *City of Bessemer v. Huey*, 247 Ala. 15, distinguishes the cited cases and to my mind gives full answer to the question here in issue. We quote at length from the decision as follows:

"On principle we say that if a city cannot acquire property to lease for private purposes, it cannot lease for private purposes property already held for public use and which is being devoted to public use, without specific statutory authority. The authorities support this position. *Buckout et al. v. City of Newport*, 68 R. I. 280, 27 A. 2d 317, 141 A. L. R. 1440; *City of Ogden City v. Bear Lake & River Water-Works & Irrigation Co.*, 16 Utah 440, 52 P. 697, 41 L. R. A. 305; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197, 204.

"But it is urged by appellants that our decisions in *Jackson v. Ball et al.*, 211 Ala. 273, 100 So. 327, and *Corning et al. v. Patton*, 236 Ala. 354, 182 So. 39, assert a contrary view. We do not agree. In those cases we held that the Board of Revenue had the implied power to lease the old Jefferson County Courthouse and jail site, 'after the use of same as a courthouse and jail had ceased' and accordingly there was no need of the property for county purposes. The allegations of the bill in the case at bar assert a contrary situation. The bill alleges that 'the City Hall Auditorium was built for public and municipal purposes * * * and has been and is being used for such purposes.' It might be added that the City Hall Auditorium was erected only about a year before the lease was made.

"(3). It is further insisted that the City Council has the power to determine whether the City Auditorium is needed for public purposes and when this authority is exercised, as was sought to be done in the present case, the discretion of the City Council in regard thereto will not be reviewed by the courts except for fraud or palpable abuse of discretion, citing *Pilcher v. City of Dothan*, 207 Ala. 421, 93 So. 16, and *Van Antwerp v. Board of Commissioners*, 217 Ala. 201, 115 So. 239. But here it is not a question of abuse of discretion, for that implies an authority to act. Here there can be no room for discretion, since there can be no authority to act as long as the property is being used for public and municipal purposes, which is the situation according to the bill. 'A municipal corporation has no implied or incidental authority to alien, or to dispose of for its benefit property dedicated to or held in trust for the public use or extinguish the public uses in such property * * *.' *Dillon on Municipal Corporations*, Vol. 3, 5th Ed., § 1102, p. 1758." (Emp. Supplied)

Referring to the underscored portions of the above decision, it is apparent that they are particularly applicable to the instant case. The county courthouse was built for public and county purposes and has been and is being used for such purposes. There has existed at no time a conclusive and continuing lack of need of courthouse office space. Drawing an analogy from the *City of Bessemer Case* to the instant one, the court of county commissioners, in similar fashion to the city council of a municipality, would have no right "to dispose of for its benefit property dedicated to or held in trust for the public use or extinguish the public uses in such property." It is obvious that there has been no complete abandonment of the office space referred to such as would constitute a final determination that the office space would never again be needed for county purposes. It is, therefore, my opinion that the present Commissioners Court of Chambers County has legal grounds for the recovery of the control and possession of the office space referred to.

It is brought to your attention that eviction proceedings are predicated upon the judgment of a court holding that a grantee must dispossess himself of property because of other right of possession to said property being paramount to his own. The authority therefore does not vest in

the court of county commissioners "to evict" the tenants referred to as this authority is vested in the proper court having jurisdiction of the subject matter. However, it is my opinion that sufficient grounds exist upon which to predicate such judicial process should the tenants refuse to voluntarily relinquish the office space discussed.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 14, 1947.

Hon. Ralph P. Eagerton,
Chief Examiner of Accounts,
CAPITOL.

Title 12, Section 12, Code of Alabama 1940—Courts of County Commissioners—Expenditure of county funds.

Court of County Commissioners of Chamber County lacks authority to issue checks to the Superintendent of Batson Memorial Hospital as a Christmas present to the staff and such expenditure of county funds is improper.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of May 30, 1947, is as follows:

"Our Examiners are making an audit of the books and accounts of the Commissioners of Court of Chambers County and find that checks were issued to the Superintendent of Batson Memorial Hospital, a joint County sanatorium established under the authority of Title 22, Section 194 of the 1940 Code of Alabama, as a Christmas present to the staff. Will you advise me as soon as possible if this is a legal expenditure of County funds?"

My answer is in the negative.

Title 12, Section 12, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, p. 560 (Title 12, Section 12, 1945 Cumulative Pocket Part, Code of Alabama 1940), prescribes generally the authority of courts of county commissioners. Contained in this Code Section are twenty-five enumerations of authority of said courts of county commissioners. Twenty-four of these enumerations deal with specific fields of authority, none of which would warrant the expenditure of county funds

referred to. The twenty-fifth enumeration (Subsection 25) is contingent in scope and reads as follows:

"To exercise such other powers as are, or may be, given by law."

I find no statutory authority or other power given by law authorizing the Commissioners' Court of Chambers County to make the expenditure noted. Courts of County Commissioners and Boards of Revenue are created by statute and have only such powers as are conferred upon them by law. Quarterly Reports of Attorney General, Vol. 45, p. 42; Biennial Report of Attorney General, 1932-34, p. 462; Quarterly Report of Attorney General, Vol. 3, p. 45; Biennial Report of Attorney General, 1928-30, p. 809.

Since there is no authority of law authorizing the expenditure you refer to, you are herewith advised that it is my opinion that checks issued to the Superintendent of Batson Memorial Hospital by the Court of County Commissioners of Chambers County as a Christmas present to the staff, constituted an improper expenditure of county funds.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 14, 1947.

Hon. H. G. Jacobs,
Mayor,
City of Scottsboro,
Jackson County,
Scottsboro, Alabama.

Elections

In County Elections to change its classification from wet to dry or vice versa the petition therefor must be signed by a percentage based on the entire number of voters voting in the last preceding general election. Title 29, Section 68, Code of Alabama 1940.

1. A petition seeking to change the classification of a county from wet to dry or vice versa, under Title 29, Section 68, Code of Alabama 1940, must be signed by qualified electors and consist of 25% of the number of voters voting in said county in the general election held November 5, 1946.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of June 27, 1947, is as follows:

"On November 5, 1946, a general election was held throughout the State for the purpose of electing a Governor and other State officers. In that election, John J. Sparkman, who was at that time Congressman from the Eighth Congressional District, was elected Senator from Alabama. Thereafter Mr. Sparkman resigned as Representative from the Eighth Congressional District and the Governor called a special general election for the purpose of electing Mr. Sparkman's successor. This election was held throughout the Eighth Congressional District on January 28, 1947, and Robert E. Jones was elected Congressman from this District."

"A petition is now being circulated in Scottsboro and Jackson County, under the provisions of Title 29, Section 68, seeking to have an election for the purpose of determining the sentiment of the County as to whether or not alcoholic beverages can be legally sold or distributed in Jackson County.

"We will appreciate it very much if you will advise us whether the number of names upon the petition is governed by the general election on November 5, 1946, or the number of persons participating in the special general election held in the Eighth Congressional District on January 28, 1947."

We have been unable to find any decisions of our court undertaking to definitely define what constitutes a general election. However, the effect of the decisions are that a general election means a state-wide election at which all the people entitled to vote under the law may vote on a question or questions affecting them as a whole. It is clear to my mind that "a general election" as used in Title 29, Section 68, *supra*, was used in this sense. Certainly it did not mean a special election.

Title 17, Section 68, Code of Alabama 1940, fixes the dates of general elections—therefore, in effect defining "general elections" within legislative meaning as being those on such dates.

Title 17, Section 68, reads as follows:

"§ 68. Time of general elections.—The governor, lieutenant-governor, attorney general, auditor, secretary of state, treasurer, superintendent of education, commissioner of agriculture and industries, senators and representatives in the legislature, and a sheriff, tax assessor and tax collector in each county and one coroner in all counties having a coroner, and other officers not otherwise provided

for, shall be elected on the first Tuesday after the first Monday in November, 1942, and every fourth year thereafter. A president of the public service commission shall be elected on the first Tuesday after the first Monday in November, 1940, and every fourth year thereafter. Two associate public service commissioners shall be elected on the first Tuesday after the first Monday in November, 1942, and every fourth year thereafter."

I conclude that the election to which your letter is addressed refers to the general election held in this State on November 5, 1946, and that the petition must have twenty-five percent of the number of votes cast in your county at such election.

Respectfully,

A. A. CARMICHAEL,

Attorney General.

July 17, 1947.

Honorable Pat Byrne,
Commissioner of Licenses,
Mobile County,
Mobile 1, Alabama.

Vending Machines—Licenses—Probate Judges—License Commissioners—Title 51, Section 613, Code of Alabama 1940.

1. Licenses issued under Title 51, Section 613, Code of Alabama 1940, for vending machines should show the place or location where such machine is to be operated, and not the address of the person owning the machine.

2. If a license under Title 51, Section 613, Code of Alabama 1940, is taken out to operate a vending machine, at a particular location, a new vending machine may be substituted for an old one if the license required by the new one is not levied at a higher rate than the license upon the old one.

3. Licenses levied under Title 51, Section 613, Code of Alabama 1940, are upon the operator of the machine and not upon the machine itself.

4. Quarterly Report of Attorney General, Volume 19, page 44, overruled and withdrawn.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

On June 18, 1947, you requested an official opinion of this office as follows:

"We shall appreciate your opinion on the following in regard to issuance of licenses for vending machines, under Section 613, Title 51, Code of Alabama 1940:—

"When a person, firm, or corporation applies for a vending machine license, should this office show on the license the address of the company owning the machine or should we show the address where the machine will be located?

"In the past, we have been showing the address of the owner of the machine and showing the serial number of the machine on the license. If the serial number was not available, we showed the name of the owner and the location where the machine was to be used, or placed.

"We realize that showing the serial number is not required, but this procedure was followed in order to enable the license Inspector to keep up with the machines, and also the machines could be moved from one location to another without changing the location on the license and our records.

"One of the Amusement companies requested us to change the serial number on a license, as the machine was being replaced with a new machine. Were we correct in doing this?

"In your opinion, please advise if the license is issued to the machine or the owner of the machine.

"Your advice in regard to the issuance of these vending machine licenses will be greatly appreciated."

In answer to your question as to whether a vending machine license issued under Title 51, Section 613, Code of Alabama 1940, should show the address of the company owning the machine or the address where the machine will be located, it is my opinion that the license should show the address where the machine will be located.

In an opinion of this office rendered to Hon. Eugene B. Henry, Commissioner of Licenses, Jefferson County, Birmingham, Alabama, under date of March 25, 1947, it was held that the license levied by Section 613, *supra*, is a license levied upon the individual for the privilege of engaging in a business or an occupation. This ruling is in accordance with the terms of Section 613, *supra*.

Title 51, Section 836, Code of Alabama 1940, provides as follows:

"Every license granting authority to engage in or exercise any business, employment, or profession, unless expressly authorized elsewhere or otherwise, shall designate the place of such business, employment or profession at some specified house or other definite place within the county of the probate judge granting it. Engaging in or

exercising any such license, business, employment, or profession elsewhere than at such house or definite place, unless expressly authorized elsewhere or otherwise by law, shall be held to be without license. A license which does not specify such house or definite place where business, employment or profession is limited thereto by law, shall be void."

It is also provided by Title 51, Section 831, Code of Alabama 1940, as amended by Act No. 546, General Acts 1943, page 535, approved July 10, 1943, relative to the issuance of licenses to engage in or carry on any business or to do any act for which a license by law is required, that "such probate judge, commissioner of licenses, or department of revenue shall issue the license properly countersigned, in the form and on the blank to be furnished by the comptroller, which shall set forth and specify the name of the person, firm or corporation applying therefor, the business or act which it is proposed to carry on or do thereunder, the name of the street or location where it is proposed to carry on the same, if such location shall be in a city or town and have a street number, and if not, then the location and amount paid for such license, and the time for which it is issued; * * * * *"

In view of the fact that the operation of a vending machine is a business, employment, or profession and that every license granting authority to engage in or exercise any business, employment, or profession must designate the place of such business at some definite house or other definite place within the county of the probate judge granting it, it is my opinion that a vending machine license should show the definite place at which such machine will be operated. The location where the vending machine is operated is the place where such machine is physically kept for the use for which the license is issued and not the business office or residence of the owner.

In answer to your second question as to whether or not a new machine may be substituted for an old one that has been previously covered by a license, it is my opinion that this substitution may be made. The license is levied upon an individual for the privilege of operating a vending machine at a definite location. A vending machine which does not require a higher license than the license taken out for such location may be substituted for the old machine at such location.

It is my opinion that the license is not issued to the machine but is issued to the individual for the privilege of engaging in the business of operating such machine. Accordingly an opinion of this office found in Quarterly Report of Attorney General, Volume 19, page 44, in which a contrary conclusion is reached is hereby overruled and withdrawn.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 17, 1947.

Hon. O. C. Maner,
Clerk of the Court of Common Pleas,
Montgomery, Alabama.

Costs and Fees; Judgment; Words and Phrases—"Costs actually created by plaintiff," Title 31, Sections 35, 36, 37, 39, 40, 45; Title 11, Sections 11, 65, Code of Alabama 1940.

Cost incurred for entering final judgment under Title 31, Section 45, Code of Alabama 1940 is "Cost actually created by plaintiff" and taxable against plaintiff under provisions of Title 11, Section 7, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of June 27, 1947, is as follows:

"John Doe filed an affidavit under Section 35 of Title 31 of the Code of Alabama, 1940, that Richard Roe is withholding possession of lands or tenements over and beyond the term for which the same was rented or leased to him, or after his right of possession has terminated or been forfeited, and that he (John Doe) desired possession of the premises.

"The affidavit was duly filed in the Court of Common Pleas of Montgomery, and the said Court issued a writ or process to the sheriff of Montgomery County commanding him to deliver to the owner or his representative full and quiet possession of the premises under authority of Section 36 of Title 31 of the Code of Alabama.

"The defendant, Richard Roe, filed a counter affidavit under Section 37, Title 31, of said Code and the case was set down for hearing and judgment was given to John Doe for the premises.

"The costs were as follows: For issuing original process, 50¢, for docketing cause, 10¢, to sheriff for serving process, \$1.00, to sheriff for receiving counter-affidavit, 50¢, to clerk of court for filing counter-affidavit 50¢, and for entering judgment, \$1.00. The plaintiff has to pay the costs created by him. Which of these items must he pay?"

After an interview with the clerk of the Court of Common Pleas of Montgomery County, the following additional facts are stated:

In the case referred to in the inquiry, execution for all of the costs was issued against the unsuccessful defendant and returned "no property found." The sole question is whether or not the plaintiff who was suc-

cessful in the suit should be taxed with that item of cost "for entering final judgment, \$1.00."

In my opinion, under the circumstances outlined in your inquiry and in the additional facts, the fee of \$1.00 for entering final judgment should be taxed against the plaintiff.

Title 31, Section 35, Code of Alabama 1940, provides a more speedy remedy to a landlord to recover possession of his land after expiration of the term of the lease. *Williams v. Prather*, 236 Ala. 652, 184 So. 473. Unless the tenant, who is the defendant, files a counter-affidavit as provided for in Title 31, Section 37, Code of Alabama 1940, there is no final judgment and no necessity for entering final judgment for the reason that a writ of possession issues as a matter of course upon the filing of an affidavit by the landlord. Title 31, Sections 35 and 36, Code of Alabama 1940. But when a counter-affidavit is filed by the tenant under the provisions of Title 31, Section 37, the statutes require a trial and, of course, a final judgment. Title 31, Sections 39 and 40, Code of Alabama 1940.

In such a case (where a counter-affidavit is filed and trial is necessary), the cost of \$1.00 for entering final judgment accrues in the case. Title 31, Section 45, Code of Alabama 1940. Ordinarily when the plaintiff is successful, and in the case outlined in your inquiry, such cost would be taxed against the defendant. Title 11, Section 65, Code of Alabama 1940.

When execution issues against the defendant and is returned "no property found," the justice of the peace is authorized to "issue execution against the plaintiff, for the cost actually created by the plaintiff but for none other, to be collected and returned as other executions" Title 11, Section 7, Code of Alabama 1940.

The specific question is, therefore, is the cost for entering a final judgment under the circumstances outlined in your inquiry, a cost which was "actually created by the plaintiff"?

I find no former opinions of the Attorney General answering this inquiry. It is clear, however, that when execution for costs is issued against the plaintiff under the provisions of Title 11, Section 7, Code of Alabama 1940, that such cost must not include all of the cost but only those items incurred or created by the plaintiff. See Biennial Report of Attorney General, 1922-24, page 84 and Quarterly Report of Attorney General, Vol. 1, p. 277. I do not find any opinions of the Attorney General or Alabama cases outlining those items of cost which are "actually created by the plaintiff."

In a Mississippi case, *Gulf and S. I. R. Company v. Mitchell*, 112 Miss. 560, 73 So. 577, it was held that a successful party was required to pay a jury tax of \$3.00 for the reason that such party filed a plea which caused the jury tax or fee to accrue. The successful party in this Mississippi case did not actually request a jury, but by his act in filing a

plea caused a jury to be impaneled and thereby caused the fee to accrue. It was held that since the cost could not be collected from the unsuccessful party the successful party was responsible for this item of cost under a statute which provided as follows:

"All costs accrued at the instance of the successful defendant in a suit, which cannot be collected out of the other party, may be collected from such defendant; and after return of 'no property' on execution against a plaintiff or complainant against whom costs were adjudged, execution may be issued against the successful defendant for all costs accrued at his instance and not paid or collected from the other party. A successful plaintiff or complainant shall be liable for all the costs of the case accrued at his instance which cannot be collected from the defendants; and after return of 'no property' on execution against the defendant against whom costs were adjudged. Execution may be issued against the successful plaintiff or complainant for all the costs of the case accrued at his instance not paid or collected from the defendant; and an unsuccessful plaintiff or complainant shall be liable for all the costs of the case."

The above cited Mississippi case would sustain the contention that the cost for entering a final judgment was not created by the plaintiff, but was created as a result of the act of the defendant. In my judgment, however, this case is not controlling. It is cited merely to show that there is authority contrary to this opinion.

The general rule as to cost is stated in 15 *Corpus Juris*, page 96, Section 186, as follows:

"In contemplation of law each party to a suit pays the cost made by him as they accrue in the progress of the suit; and while in most jurisdictions this theory is ordinarily not carried into practice, each party is nevertheless primarily liable for cost made by himself to the officers or to other persons rendering the services for which the costs were incurred, although the adverse party may ultimately be compelled to pay the cost by the judgment of the court, unless as seems to be the case in some jurisdictions, primary liability for cost made by the successful party is by statute imposed on the party cast. In any event if cost cannot be made out of the party cast, the successful party may be compelled to pay cost made by himself. This, however, is the limit of his liability; he cannot be compelled to pay the costs made by his unsuccessful adversary."

In your case the plaintiff in all probability did not expressly request that a final judgment be entered. Nevertheless, when the plaintiff filed his suit he must have known, or had reason to believe, that it would be necessary to prosecute the case to a final judgment. The defendant, in cases of the type described in your inquiry, had a right to file a counter-affidavit and thereby cause a trial on the issue in the case. In my judgment, it cannot be said that the defendant by filing a counter-

affidavit caused a final judgment to be entered. The final judgment in this case was for the benefit of the plaintiff and was, in my opinion, "actually created by the plaintiff" within the meaning of Title 11, Section 7, Code of Alabama 1940.

In the case of *Brown v. Young*, 8 Ky. L. 523, it was stated, "In the progress of the suit there are many things done necessary to end the litigation, which neither party directs, the fees for which constitute what are called general costs. It has been held that such fees are properly taxable against the successful party who is entitled to recover them against the unsuccessful antagonist, but the fact that the unsuccessful party may be insolvent furnishes no reason why the successful party should not pay such costs."

In my judgment, therefore, the item of \$1.00 for entering a final judgment should be taxed as cost against the plaintiff under the provisions of Title 11, Section 7, Code of Alabama, 1940.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 21, 1947.

Honorable A. R. Meadows,
State Superintendent of Education,
State Department of Education,
CAPITOL.

Charities—Charitable Trusts—Trusts—Modification or termination—Schools—Charlotte Thorn Endowment Fund—State Board of Education—Title 52, Sections 38, 39, 40, Code of Alabama 1940.

1. When the provisions of a deed of trust setting up an endowment fund for charitable purposes for unnamed, unidentified and numerous beneficiaries, are clear and unambiguous, the provisions cannot be altered or modified.

2. State Board of Education as trustee under deed of trust expressly requiring principal of trust fund to remain intact for specified period cannot alter conditions of grant and use funds for unauthorized purpose.

3. Since beneficiaries of charitable trust are numerous, unidentified and indefinite their consent to change conditions of trust deed is impossible.

Opinion by Assistant Attorneys General Sykes and Hardin.

Dear Sir:

Your request for an official opinion bearing date of July 9, 1947, is as follows:

"The State Board of Education needs \$25,000.00 to complete raising the necessary amount—\$150,000.00—to rehabilitate Calhoun School, Calhoun, Alabama.

"During the years 1943 and 1944, the Treasurer of Calhoun School, Inc., approached representatives of the Alabama State Board of Education asking whether the State Board of Education would consider taking over Calhoun School, Calhoun, Alabama, and operate it under the direction of the Board of Trustees of Calhoun School. The reply was that the State would be willing to consider operating the school on condition that the Board of Trustees of the school would renovate the entire plant, including water and light facilities, and provide \$12,000.00 annually for a period of five years. This proposal was not accepted.

"The second proposal came from the representatives of the State Board of Education to this effect: The state will operate the school in the interest of the Negro children of Alabama in accordance with the wishes of the donors of all the school property provided the Calhoun School, Inc., would transfer all of the property of the Calhoun School, Inc., including real estate, tangible personal property, all securities and cash, to the State Board of Education of Alabama, with the further understanding that the State Board of Education would conduct the school for Negro children in accordance with the deed of trust dated June 29, 1945, and accepted by the State Board of Education under date of September 17, 1945.

"The purpose of the transfer of this property on the part of both the Calhoun School, Inc., and the State Board of Education were to assure better educational opportunities for Negro children, especially those rural districts of Alabama and to establish a rural laboratory school for the training of Negro teachers by the State Teachers College, Montgomery, Alabama.

"To accomplish these purposes, it is necessary to restore the dormitories, teachers' home, administration building, residential and shop buildings, all water and light facilities, erect a gymnasium-auditorium, build and equip an educational plant for 350 children (Grades one through twelve).

"When this proposal was made by the State, it was estimated that the cost of the rehabilitation of the plant would be about \$100,-

000.00. Today, according to the best estimates, it will cost \$150,-000.00.

"When the property was transferred to the State Board of Education, it was agreed by the grantors that \$25,000.00 could be used for necessary expenses and improvement of the plant and that the remainder of the securities and cash should constitute The Charlotte Thorn Endowment Fund, the income from this to be used as part of the program for the education of Negroes, especially those of rural districts of Alabama, and would be developed under the administration of the State Board of Education. It was further agreed that this principal would be kept intact for at least ten years and not to be expended thereafter unless at least two-thirds of the members of the State Board thought that the use of part of the principal was essential to promote the best interests of the school.

"The securing of \$30,000.00 from a philanthropic foundation for developing Calhoun School is dependent upon the ability of the State Board of Education to secure an additional \$25,000.00.

"In the judgment of the State Board of Education, the interests of the Negro children of Lowndes County and Alabama and the State Teachers College, Montgomery, Alabama, can be served better by lifting from this principal an additional amount of \$25,000.00 and use it in the restoration of the plant than they would be if the principal remain intact until the ten-year period had passed, during which time, the children will have suffered for the lack of educational opportunities by virtue of the fact that buildings and facilities were not provided. While the children that are born and those yet to be born constitute the beneficiaries of this charitable grant have not reached majority and cannot speak for themselves, the members of the State Board of Education feel responsible for exercising the best judgment possible in the management of this trust. This, the Board feels, can best be accomplished by spending this amount (\$25,000.00) of the principal now to make secure the other \$125,-000.00, which will be used in the restoration of the plant for the children at present and those who are to come later.

"I am sending to you that part of the file in connection with the Calhoun School, Inc., which I think will be of service to you in rendering a decision.

"Exhibit 1. The original copy of the deed of conveyance.

"Exhibit 2. A letter from Thomas Jesse Jones under date of June 29, 1945, to the State Board of Education of Alabama.

"Exhibit 3. A letter under date of May 13, 1947, from Dr. A. R. Meadows to Dr. Fred McCuiston of the General Education Board of New York City.

"Exhibit 4. A letter from L. A. Roy under date of May 29, 1947, to E. G. McGehee, Jr., Director of Negro Education, State Department of Education and E. G. McGehee's reply to Mr. Roy under date of June 3, 1947.

"Exhibit 5. Revised proposal for rehabilitation and capital outlay expansion of Calhoun School.

"Exhibit 6. Some pertinent supplementary observations respecting the Calhoun School program.

"Questions:

"1. Is the State Board of Education, under existing circumstances, justified in using an additional \$25,000.00 from the Charlotte Thorn Endowment Fund as part of the total cost (\$150,000.00) of rehabilitation of the Calhoun School?

"2. Is the State Board of Education justified in using an additional \$25,000.00 from the Charlotte Thorn Endowment Fund to make sure of \$30,000.00 from a philanthropic foundation?

"3. If the State Board of Education constitutes the Board of Trust for the handling of this property, can they, on the basis of the purposes for which it was transferred and the excessive prices of labor and materials, be justified in making use of any part of this capital toward the restoration of Calhoun School?

"4. Would the members of the State Board of Education violate the spirit and intent of the deed by using an additional \$25,000.00 of the Charlotte Thorn Endowment Fund for rehabilitating Calhoun School, Calhoun, Alabama?

"You see from the questions that I am raising that the State Board of Education is sorely in need of an additional \$25,000.00 to satisfy the amount—\$150,000.00—necessary for the rehabilitation of Calhoun School, Calhoun, Alabama.

"An opinion from you in this regard will be appreciated by both the State Board of Education and its Executive Secretary."

All of the questions in your inquiry may be combined into the following one: May the State Board of Education as trustee under a deed of trust executed September 17, 1945, use an additional \$25,000.00 from the principal of "The Charlotte Thorn Endowment Fund" for the purpose of improving the plant and facilities of the Calhoun School, Inc.? The \$25,000.00 above referred to is in addition to the \$25,000.00 expressly provided for in paragraph e in said deed of trust.

In my opinion such principal in the Charlotte Thorn Endowment Fund must not be depleted until the expiration of ten years from September 17, 1945.

The deed of trust is one wherein the Calhoun School, Inc., deeds certain securities, land, money, etc., to the State Board of Education of Alabama. See Title 52, Sections 38, 39 and 40, Code of Alabama 1940. The deed imposes certain conditions. Some of these conditions are set out in that part of the deed (paragraph e) establishing and providing for the Charlotte Thorn Endowment Fund as follows:

"It is expressly agreed that, of the securities and capital cash hereinbefore described (other than those held in the Wendell Phillips Fund), a sum not exceeding Twenty-five Thousand Dollars (\$25,000.00) may be used for necessary expenses and improvements of the Calhoun School plant and equipment, and the remainder of said securities and cash shall constitute a trust fund to be known as the 'Charlotte Thorn Endowment Fund,' the income from this Fund to be used as part of the program for the education of Negroes, especially Negroes in rural districts of Alabama, to be developed under the administration of the State Board; the principal of said fund to be kept intact for at least ten years and not to be expended thereafter unless at least two-thirds of the members of the State Board, after deliberation, shall be of the opinion and shall have so voted in person at a duly constituted meeting of the State Board, that the use of a part of the principal is essential to promote the best interests of the school."

The deed of trust contains no reservation on the part of the grantor of the right to change or alter the conditions of the grant or terms of the trust. No special power is conferred upon the trustee to alter the specific conditions imposed by paragraph e, supra.

In my judgment, the above language is plain and unambiguous. It was clearly the intent of the donor or grantor that with the exception of \$25,000.00 expressly set apart for the improvement of plant and equipment the remainder of the fund and the principal thereof should be kept intact in order that the income thereof could be used as described in paragraph e above quoted.

It is my opinion that the courts could not construe the terms of paragraph e, supra, in such a way as to deplete the Endowment Fund. *Thomas v. Reynolds*, 234 Ala. 212, 174 So. 753.

In 3 *Scott on Trusts*, p. 1970, Section 367.2, it is stated that neither the donor nor trustee can modify the terms or conditions of a charitable trust. See also *O'Brien v. Physicians Hospital Assn.* (Ohio) 116 NE 975, L.R.A. 191F, p. 741, 14 C.J.S., p. 533, citing *Author's Club v. Kirtland*, 288 NYS 916, 248 App. Div. 82 and *In re Kulko's Estate*, 142 Ore. 104, 18 P. 2d 1036.

It may be added that a private trust may be revoked or modified with the consent of both settlor and the beneficiary. However, since the beneficiaries of a charitable trust are of necessity numerous, indefinite and unidentified, the consent of beneficiaries is impossible and hence no modification of the trust is possible. 3 Scott on Trusts, p. 1969, Section 367.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 21, 1947.

Hon. A. R. Meadows, Superintendent,
State Department of Education,
CAPITOL.

Schools—Teachers—Title 52, Sections 351-361, Code of Alabama 1940—Act No. 411, General Acts 1945, page 646.

1. To attain a continuing service status under Title 52, Sections 351-361, Code of Alabama 1940, a teacher must serve under contract as such in the same county or city school system for three consecutive years, and then be reemployed for the current school year following.

2. If a teacher having such continuous service status thereafter resigns or gives notice in writing that he or she will not accept the salary fixed in accordance with the law by the employing board of education and offered to such teacher, such resignation or refusal breaks or interrupts the continuity of such continuous service status, and such teacher can regain such status only by entering into a new contract and serving continuously under the same conditions required in the first instance for attaining such status.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion bearing date of April 17, 1947, is as follows:

"Section 352, Chapter 13, Title 52, Code of Alabama 1940, specifies the manner in which a teacher in the public schools may attain continuing service status. In accordance with this section your ruling on the following questions is requested:

"1. If a teacher on continuing service status notifies the employing board that she will not accept the salary offered by such board even though such offer is in accordance with the tenure act, does such notice terminate her continuing service status with the employing board?

"2. If the answer to question 1 is yes, or if a teacher resigns after securing continuing service status, can such teacher regain continuous service status immediately upon being again employed by said board or must such teacher serve under contract another three consecutive years and then be thereafter reemployed in order to secure continuing service status?

"3. Does the word 'thereafter' in section 352 mean that a teacher must be employed the fourth consecutive year or may the reemployment be after a lapse of one year or more after three years of consecutive service under contract with the same employing board?"

Chapter 13, Title 52, Sections 351-361, Code of Alabama 1940, had its origin in Act No. 499, General Acts 1939, page 759, approved September 21, 1939.

A reading of this statute discloses that it was the plain purpose of the legislature to remove (as far as possible) teachers in the public schools of Alabama from the orbit of political vicissitudes and to secure the teachers continuing employment for succeeding years. **Board of Education of Marshall County v. Baugh**, 240 Ala. 391, 395, 199 So. 822; **Baugh v. Board of Education of Marshall County**, 244 Ala. 522, 524, 14 So. 2d 508; **Board of School Commissioners of Mobile County v. Hahn**, 246 Ala. 662, 663, 22 So. 2d 91. Quarterly Report of Attorney General, Vol. 20, pages 221, 229.

Section 352, supra, expressly states the necessary conditions by which a teacher may acquire a continuing service status. It says:

"(a) Such teacher shall have served under contract as a teacher in the same county or city school system for three consecutive years and shall thereafter be reemployed in such county or city school system. (b) Such continuing service status can be conferred only by the reemployment of such teachers for the school year beginning in the fall of 1940, * * * * * (Emphasis supplied).

The specific questions propounded in your letter have never been before our court or this office.

I shall review Section 352 in the light of the entire enactment. It is clearly the purpose of this statute to require at least three years of continuous teaching in any county or city school system in that county, then the teacher is eligible to be reemployed. The statute says "reemployed." That simply means that a new contract must be entered into,

and when this is done a teacher has attained a legal status of continuing service in such county or city school system. Subsection (b) of Section 352 fixes the time within which the said reemployment must be made. It directs that it must be for the school year beginning in the fall of 1940. The obvious intent was to retain the unbroken services of the teacher engaged in teaching at the time of the passage of the act. Section 352, immediately following the provisions above considered, closes with this provision, "or for some subsequent school year." The evident purpose of this last provision was to insure the continuance in the future of a staff of trained teachers. Under this stated clause, new teachers could be employed and when they shall have served three consecutive years, they are eligible for reemployment; and when this is done they have a continuing service status within the meaning of the law. When either of these classes of teachers here under consideration attains this continuing service status, the law throws around it a further security. Section 353 of the statute provides that these contracts shall remain in full force and effect unless superseded by a new contract signed by both parties or unless cancelled as provided in Section 357 or Section 358, supra. The questions before me do not require consideration of these last sections.

Section 354 immediately following modifies the contract provisions of Section 351 by providing that the salary may be changed for any succeeding year to agree with a general salary schedule adopted by the employing board of education. However, this change cannot be made unless the employing board of education issues a notice in writing to the teacher as provided in Section 360, as amended by Act No. 411, General Acts 1945, page 646.

I am of the opinion: (1) That where a teacher having a continuing status notifies the employing board of education that he or she will not accept the salary offered by the board, although the same is authorized by this statute, he or she thereby breaks the continuity of the service status and terminates the same. (2) That, if a teacher having such a continuing service status resigns, said teacher thereby interrupts the continuity of the service status and cannot regain the same except by entering into a new contract and serving continuously thereunder for a period of three years, and then entering into a new contract to begin the succeeding year. (3) That it is necessary to serve three continuous years and be employed for a fourth year in order to attain a continuing service status under the law.

Yours truly,

A. A. CARMICHAEL,

Attorney General.

July 21, 1947.

Honorable G. Claiborne Blanton,
Judge of Probate,
Dallas County,
Selma, Alabama.

Deeds, Mortgages, Filing Fees, Title 51, Sections 618 & 619,
Code of Alabama, 1940.

1. Where deed offered for recording recites a consideration of the sum of \$3,000. secured by purchase money mortgage in the sum of \$3,000. a mortgage tax should be charged on the basis of \$3,000. and a deed tax should be charged on the excess of the value of the interest conveyed by the deed above the sum of \$3,000.00.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion bearing date of June 27, 1947, is as follows:

"I am enclosing herewith photostat copy of a deed between J. H. Johnson and Walter J. Gray, et al. This deed has been filed in my office for record.

"Will you please be kind enough to give me your opinion as to whether or not it is taxable under Title 51, Section 118 of the Code of Alabama, 1940?"

In your request for an opinion I assume that the section which you have cited as section 118 should be 618.

It is my opinion that you should collect a recording tax under the provisions of Title 51, Section 619, Code of Alabama 1940, upon the sum of \$3,000.00 unless the purchase money mortgage in the sum of \$3,000.00 has been previously recorded and the tax thereon paid.

The provisions of law controlling your action when a deed is filed for record which recites that a part of the purchase money is unpaid is as follows, Title 51, Section 619, subsection (c), Code of Alabama 1940:

"(c) That when any deed is filed for record which recites that part of the purchase money is unpaid, such deed to the extent of such unpaid balance shall be held and treated as a mortgage, and the mortgage tax shall be collected by the judge of probate in addition to the tax for recording the instrument as a deed before recording

the same, unless said balance of purchase money shall be secured by mortgage or deed of trust which has already been filed for record, and the tax thereon paid, and the fact of such prior payment shall be endorsed on the deed. When any such deed is recorded, and the tax thereon is paid, and thereafter a mortgage securing the debt is filed for record, the same shall be admitted to record without the payment of the mortgage tax and the fact of such prior payment shall be endorsed on the deed."

From this subsection you will see that the deed as to that part of the purchase money which is unpaid is to be treated as a mortgage and the mortgage tax is to be collected thereon. Of course, if the purchase money mortgage has already been filed for record and the tax paid thereon you should not treat any part of the deed as a mortgage.

As to any amount, if any, to be collected as a deed tax, Title 51, Section 618, Code of Alabama 1940, provides as follows:

"Provided that only the value in excess of any mortgages or vendors lien upon any property within this state on which the mortgage tax has been paid, shall be taxable under this section, * * *."

In other words, you should collect a deed tax, in addition to the mortgage tax, upon the value of the interest conveyed which is in excess of the \$3,000.00 upon which mortgage tax is to be paid. In the event that the interest conveyed does not exceed \$3,000.00, there should be no deed tax collected. This opinion is sustained by the following prior opinions of this office.

Biennial Report of the Attorney General, 1926-28, page 364;

Quarterly Report of Attorney General, Vol. 7, p. 185;

Quarterly Report of Attorney General, Vol. 8, p. 135.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 22, 1947.

Hon. G. H. Wright,
Mayor, City of Auburn,
Auburn, Alabama.

Municipalities—City of Auburn—

The citizens of the City of Auburn acquired no hunting or fishing rights under the agreement made on May 21, 1946, between the Auburn Water Company, a corporation, and the City of Auburn. Said agreement is subject to the lease agreement

made under date of February 11, 1941, between the Auburn Water Company and Isham J. Dorsey, Sr., Isham J. Dorsey, Jr., and John Thomas Frazer, as amended by a supplemental agreement between the same parties made on April 19, 1944.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

This is in reference to your request for an opinion as to the status of the citizens of Auburn as to fishing and hunting rights on the property covered by an agreement made on May 21, 1946, between the Auburn Water Company, a corporation, and the City of Auburn.

Your attention is called to Paragraph 2 of this agreement, which is in part as follows:

"The purchase price for the properties described in Paragraph 1 above shall be \$300,000, which shall be paid by the City in cash at the closing against delivery of a deed or deeds and other instruments of transfer and assignment conveying title to such property free of liens, claims and encumbrances, done, suffered or permitted by the Company, except (a) the lien for ad valorem taxes for the current tax year; (b) that certain agreement dated February 11, 1941 between the Company as lessor and Isham J. Dorsey, Sr., Isham J. Dorsey, Jr., and John Thomas Frazer as Lessees, as amended by Supplemental Agreement between the same parties dated April 19, 1944; * * *

It will be seen from the above provision of the agreement of May 21, 1946, that the property under consideration is subject to a lease agreement made under date of February 11, 1941, between the Auburn Water Company and Isham J. Dorsey, Sr., Isham J. Dorsey, Jr., and John Thomas Frazer, as amended by a supplemental agreement between the same parties made on April 19, 1944.

The above referred to lease of February 11, 1941, provides in part as follows:

"This lease shall give the Lessees, including the members of their immediate families, and the Lessees' guests (as hereinafter defined) the exclusive hunting, fishing and boating privileges on such lake, except as to the agents, employees and officers of the Lessor and the Lessor's guests (as hereinafter defined)." (Emphasis supplied.)

Under the above quoted provision of the lease, the Lessees, Isham J. Dorsey, Sr., Isham J. Dorsey, Jr., and John Thomas Frazer, including the members of their immediate families and Lessees' guests as defined in the lease, acquired "the exclusive hunting, fishing and boating privi-

leges of such lake, except as to the agents, employees and officers of the Lessor and the Lessor's guests" as defined therein. The exercise of the privileges granted in the lease are subject to certain conditions contained therein.

In view of the fact that by the express terms of the agreement made on May 21, 1946, between the Auburn Water Company and the City of Auburn, such agreement is subject to the lease agreement of February 11, 1941, between the Auburn Water Company and Isham J. Dorsey, Sr., Isham J. Dorsey, Jr., and John Thomas Frazer, as amended by a supplemental agreement between the same parties dated April 19, 1944, it is my conclusion that the citizens of Auburn, under the agreement of May 21, 1946, acquired no fishing or hunting rights in the property under consideration.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 22, 1947.

Hon. Thos. W. Jones,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Elections — Voting Machines — Returning Officer — Title 17,
Sections 105 and 112, Code of Alabama.

In those counties in which the use of voting machines has been adopted, it is not necessary to appoint a returning officer to act in such election; the duties heretofore performed in elections by the returning officer are now performed by the election officials appointed under Title 17, Section 105, Code of Alabama 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of June 13, 1947, is as follows:

"Title 17, Section 105

"This section of the voting machine law provides for the appointment and duties of an inspector of elections and three clerks.

"No provision is made for the appointment of a returning officer nor are any of the other election officials authorized to make return of the results of the election.

"Does section 119 of this title furnish authority for the appointment of this official, if the services of a returning officer is necessary under the voting machine laws."

In answer to your request, you are advised that Title 17, Section 119 of the Code of Alabama 1940, is not authority for appointing a returning officer in those counties in which the use of voting machines has been adopted.

In this connection, your attention is called to Title 17, Section 112, Code of Alabama 1940, which provides in detail the method of canvassing the returns on each machine used in an election where voting machines have been adopted. This section provides that the return of the canvass, as required by law, shall be filled out, and shall show the number of votes cast for each candidate, the number of votes cast for and against any proposition submitted, and that such returns of canvass shall then be signed by the election officials. In another part of this same section, it is provided that irregular and challenged ballots, properly sealed, and signed, shall be filed with the original statement of canvass, which said canvass shall then, by the election officials, be delivered in the same manner and by the same authorities as now provided by law. These provisions of Section 112, *supra*, in my opinion, do away with the necessity of appointing a returning officer in those elections in which voting machines are used.

You are, therefore, advised that in those elections in which voting machines are used, there is no necessity nor is there any authority for an appointment of a returning officer in such elections.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

July 23, 1947.

Hon. A. B. Jefferies, Chairman,
Board of Revenue and Road Commissioners,
Mobile County,
Mobile, Alabama.

Constitutional Law — Counties — Elections — Constitution of
Alabama 1901, Sections 44, 212.

1. In the absence of a statute the county governing body is not authorized to pay the expense of an election called for merely advisory purposes or to test the sentiment of the people.

2. The legislature is not prohibited by Sections 44 or 212 of the Constitution of Alabama 1901 from enacting a law authorizing the county to hold and pay the expenses of an election which is merely advisory in nature.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, contained in a letter dated June 25, 1947, by Mr. William V. McDermott, County Attorney for Mobile County, Alabama, is as follows:

"At a regularly scheduled meeting of the Mobile County Board of Revenue & Road Commissioners on yesterday, June 24, 1947, a resolution was regularly introduced and adopted directing that I request for said Board your official opinion as to whether or not an advisory election could legally be called by the governing body of Mobile County and the expenses thereof paid for with public funds of Mobile County for the purpose of ascertaining what type of a given tax, if any, was desired by the people of Mobile County for the purpose of raising additional funds in aid of the Public School system of this county.

"In order that you might have before you the basis upon which this request has been grounded, I am enclosing to you herewith a copy of the letter dated May 16, 1947, which the Hon. Joseph N. Langan, State Senator from this county and district, submitted to our County governing body, as well as a further letter dated June 12, 1947, submitted by Senator Langan to the governing body of Mobile County. There is also submitted herewith a copy of the letter addressed to said Board dated May 19, 1947, from the Hon. Vincent F. Kilborn who was then acting as County Attorney in my place because of my incapacity due to illness.

"I have not been advised of any proposed bill that has been drafted by or for Senator Langan embodying the purposes expressed in this said letter and I am therefore unable to submit a draft of any such proposed bill to you for consideration in connection with this request.

"The undersigned concurs with Mr. Kilborn and has advised our County governing body that there is no statutory authority express or implied presently authorizing the calling of any such advisory election referred to by Senator Langan. Nor in the opinion of the undersigned would a proposed bill for the purpose of authorizing such an advisory election, if otherwise carefully prepared and lawfully enacted, be constitutionally valid under our present constitution. Pertinent are Sections 44 and 212 of the Constitution of Alabama 1901. The calling of an advisory election or the spending of public

monies in payment of the expenses of such election would, in the opinion of the undersigned, be an illegal attempt to relieve the taxing authority (The Legislature) of the responsibility now vested in them by a substitution of another agency. See *Donoghue versus Bunkley* decided February 28, 1946, and reported in 25 Southern Reporter Second Series pp 61-71."

Since a county governing body is of limited jurisdiction and created by statute, it can perform only those duties expressly authorized by statute or necessarily implied. *Corning v. Patton*, 236 Ala. 354, 182 So. 39. I find no law authorizing the Board of Revenue and Road Commissioners of Mobile County to pay the expenses of an election of the type referred to in your inquiry and, therefore, in the absence of legislation, such expense cannot be legally paid by the county.

I am of the opinion, however, that neither Section 44 nor 212 of the Constitution of Alabama 1901 prohibits the legislature from enacting a valid law authorizing the county to hold an election which would be advisory merely and further authorizing the county to pay the expenses thereof.

The Constitution of Alabama of 1901 in Section 44 provides as follows:

"The legislative power of this state shall be vested in a legislature, which shall consist of a senate and a house of representatives." Section 212 provides as follows:

"The power to levy taxes shall not be delegated to individuals or private corporations or associations."

In the case of *Donoghue v. Bunkley*, Supreme Court of Alabama, February 28, 1946, 25 So. 2d 61, it was held that an act levying a tax on certain beverages which was to be effective or operative only in the event of a favorable vote of the electors violated Section 212, *supra*. In the *Bunkley* case, *supra*, the tax was not to become effective unless and until a majority of the voters voted in favor of the tax. The Supreme Court held that because of this feature of the act the legislature had attempted to delegate its power to tax and that hence the act was unconstitutional. In my judgment, there is a wide distinction between this type of act and the type that would provide for a mere advisory election. In the former case, the legislature has attempted to delegate the power to tax or make the law to the people. This is clearly prohibited by Section 212, *supra*. But in the latter case, where an election is advisory merely, the electors would not be making a law. They would merely be expressing their sentiment concerning the question presented before the question is formally introduced in the legislature. The legislature would not be legally bound to enact legislation in conformity with the results of the election.

Section 44 of the Constitution, *supra*, also prohibits the legislature from delegating its legislative powers, including its taxing powers. For

the same reasons given in the above paragraph, it is my opinion that an act providing for a merely advisory election on a question other than taxation would not violate Section 44, supra. The decision in *In Re Opinions of the Justices*, 232 Ala. 56, 166 So. 706, held that a proposed bill providing that the bill would not become a law unless made so by an affirmative vote of the qualified electors violated Section 44 of the Constitution. This decision outlines the constitutional objections to such a law. In my opinion, this decision would not prohibit an advisory election, the results of which would not make or defeat a law.

It is my conclusion, therefore, that since an advisory election would not be binding, would not make or defeat a law, and would merely test the sentiment of the people before a law is later enacted, the legislature is not prohibited from adopting this means of informing its members. Neither do I find any constitutional provision prohibiting the legislature from authorizing the county to pay the expense of such an election.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 23, 1947.

Hon. Howard Roper, Member,
Court of County Commissioners,
Chilton County,
Route # 1,
Jemison, Alabama.

Counties — Schools — Creosoting Plant — Constitution of Ala.
1901, Sec. 94.

County not authorized to make appropriation to creosoting plant project, which creosotes posts and timber for the public under the supervision of vocational class of a county high school.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, dated July 12, 1947, is as follows:

"As a member of the Court of County Commissioners of Chilton County, Alabama, I would like to have your advice on the following:

"It has been proposed that a creosoting plant be built on the high school property for creosoting post and timber for the public. This creosoting is to be done under the supervision of the voca-

tional class of Chilton County High School. Application has been made to the Court of County Commissioners for a donation of \$1300.00 on this project.

"Please advise me whether or not it will be legal for the Court of County Commissioners to donate any amount to this project.

"Your early advice will be appreciated."

I am of the opinion that your inquiry should be answered in the negative.

It is true that Title 52, Sections 207 and 388, Code of Alabama 1940, authorize counties to make appropriations for the support of the public school within the county, and for Smith-Hughes type of vocational training, respectively.—CF. Quarterly Report of Attorney General, Volume 32, page 14. However, the appropriation here under consideration, in my judgment, comes within the inhibition of Constitution of Alabama 1901, Section 94, which is as follows:

"The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

The above conclusion is in accordance with a former opinion of this office, and the authorities cited therein, which held that in view of this constitutional provision a county was not authorized to appropriate public funds for the purpose of locating and promoting a canning factory in the county.—Quarterly Report of Attorney General, Vol. 37, Page 31. Likewise, said conclusion adheres to a later opinion holding that a county was not authorized to contribute to or build a quick freeze plant.—Quarterly Report of Attorney General, Vol. 44, Page 15.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 25, 1947.

Honorable C. W. Martin,
Clerk of the Circuit Court,
Elmore County,
Wetumpka, Alabama.

Clerks of the Circuit Courts—Fees—Allowances—

Act No. 90, Local Acts 1943, page 46. Title 11, Section 22,
Code of Alabama 1940.

The clerk of the circuit court of Elmore County, when acting as ex-officio clerk of the Court of Common Pleas of Elmore County, is not entitled to receive five percent of any sum or sums collected for the State of Alabama, as provided for by Title 11, Section 22, Code of Alabama 1940.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of May 8, 1947, is as follows:

"I desire your official opinion upon the following matter: Am I, as ex-officio clerk of the Court of Common Pleas of Elmore County, Alabama, entitled to five percent as compensation for the collection and remittance of money sent to the Department of Public Safety of Alabama under Act #90 of the Local Acts of 1943, page 47, Section 6, wherein the Section provides in part as follows:

"The Clerk shall receive the same fees and costs as are now allowed by law to Clerks of the Circuit Courts of this State, as his compensation."

In my opinion your question must be answered in the negative.

Act No. 90, Local Acts 1943, page 46, among other things, creates and establishes a court in and for Elmore County, Alabama, to be known as the Court of Common Pleas of Elmore County. Section 6 of such act provides that the clerk of the circuit court of Elmore County shall serve as the ex-officio clerk of the Court of Common Pleas of Elmore County, prescribing his duties as such. This section further provides, with reference to the compensation to be received by such official for the performance of his duties in connection with the Court of Common Pleas that:

"The Clerk shall receive the same fees and costs as are now allowed by law to Clerks of the Circuit Courts of this State, as his compensation." (Emphasis supplied.)

The compensation about which you inquire is that provided for by Title 11, Section 22, Code of Alabama 1940, which is as follows:

"The clerks and registers of the several circuit courts of the State of Alabama shall receive five percent of any sum or sums collected by such clerk or register for the State of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such clerk or register making the collection from such sum or sums collected."

The question therefore devolves into a question as to whether the compensation provided for by the above statute is included within the meaning of the words "fees" and "costs" as used within Section 6 of Act No. 90, *supra*.

In my opinion it is not. The law of costs and fees in this State is highly penal in nature and must be strictly construed, and any public officer claiming a fee must be able to point to some clear and definite provision of law authorizing the same. Such is the provision and requirement of Title 11, Sections 1 and 79, Code of Alabama 1940, which statutes, in their respective order, provide as follows:

"The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law. No provision of this title shall repeal any statute relating to costs or fees, which by its express terms was not intended to apply to all the counties of the state."

"The law of costs must be deemed and held a penal law, and no fee must be taken but in cases expressly provided by law. The fees prescribed in this Code shall be the only fees that can be collected by any officer."

The "five percent" provided for within Title 11, Section 22, *supra*, is not designated as a fee, commission or allowance, but is defined merely as "compensation."

It has been said by our Supreme Court, in considering the meaning of the word "commission," that such word, when it is used to express compensation for services rendered, denotes a percentage on the amount of money paid out or received. *Purifoy, Auditor v. Godfrey*, 105 Ala. 142, 16 So. 701. It would therefore appear that the court considers as synonymous the terms "commission" and "percentage."

It was likewise held in the same opinion of the Supreme Court, in further considering the meaning and significance of the term "commission" that:

"The obvious meaning of the word is an allowance of compensation to the solicitor for the rendition of service, the allowance be-

ing dependent wholly upon the rendition of the service, and not upon the receiving or payment of the fees."

Thus it seems that the Supreme Court has placed a "commission" in the category of an "allowance."

That there is a distinction between fees and allowances is pointed out in the opinion rendered by the Supreme Court in the case of *Stone, Treasurer, v. State, ex rel. Holcombe*, 197 Ala. 293, 72 So. 536, which decision points out that our statutory system in respect of the compensation of public officers intends and must observe a distinction between the two terms. -

The terms "costs" and "fees," while not synonymous, can be used interchangeably as having the same application. Actually, however, such terms are readily distinguishable and each has an applicable and peculiar meaning in law. "Costs" are the expenses incurred by the parties in the prosecution or defense of a suit, whereas "fees" are compensation to an officer for services rendered in the progress of the cause. 9 Words and Phrases (Perm. Ed.), Costs, 810-811.

Inasmuch as that portion of Section 6 of Act No. 90, supra, here considered is concerned with and makes provision for the compensation paid to an officer for services rendered, it is my opinion that the terms "fees" and "costs," as used within such section, are used interchangeably and that, within the meaning of such act, it was intended that such terms have the same application. Otherwise, the inclusion of the term "costs" would be meaningless.

The question therefore arises as to whether the percentage allowance provided for by Title 11, Section 22, falls within the meaning and intent of the terms "fees" and "costs" as used within Act No. 90, supra.

In my opinion it does not. On the basis of the above authorities, it is my opinion that the "percentage" provided for in Title 11, Section 22, supra, is a "commission" or "allowance," as distinguished from "fees" or "costs," and that such "percentage" is not included in the terms "fees and costs" as used in Act No. 90, supra. Therefore, you are not entitled to such allowance when acting as ex-officio clerk of the Court of Common Pleas of Elmore County. Any holding to the contrary would not be in accord with the clear principle of law relative to the penal nature of the law of costs and fees and the strict construction to be given such statutes.

It is to be noted that the legislature, in providing for the compensation of clerks of the circuit courts who are ex-officio clerks of the county courts of the various counties of the State, provided that they should receive the same "fees and compensation" which they received as clerks of the circuit courts of the State, (Title 13, Section 316, Code of Alabama 1940), whereas Section 6 of Act No. 90, supra, in providing for

your compensation as ex-officio clerk of the Court of Common Pleas of Elmore County, merely provides that you shall receive the same "fees and costs" as the clerks of the circuit courts of the State. In my opinion, the omission of the word "compensation" from the above act is significant.

The holding herein is in accord with the conclusion reached in a former opinion of this office found in Quarterly Report of Attorney General, vol. 20, page 284, wherein substantially the same question was considered. Accordingly the reasoning and conclusion expressed in such opinion is hereby reaffirmed.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

July 28, 1947.

Honorable J. C. Harper, Mayor,
Town of Oak Hill,
Wilcox County,
Oak Hill, Alabama.

Municipal Corporations—Expenditure of Public Funds—

Act No. 314, General Acts 1945, page 504; Title 51, Section 713, Code of Alabama 1940; Title 29, Section 11, Code of Alabama 1940.

1. The governing body of a municipality may expend public funds for the purpose of maintaining and improving the roads and streets located within the corporate limits of such municipality.

2. Such expenditure may be made from any funds within the city treasury not specifically earmarked for other purposes.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of April 28, 1947, is as follows:

"I am requested by the town council of the Town of Oak Hill, Ala. to secure a ruling by you on the following questions—

"Can the town council spend money now in our treasury which was derived some from our local taxes some from state funds for

the purpose of improving our road from the state highway to our church and cemetery. A part of said cemetery is within the corporate limits of our town."

In your reply of June 28, 1947, to my request for additional information concerning the question here considered, you furnish me with the following facts:

"In reply to the enclosed letter wish to say—That the road leading from the state highway to the church and cemetery on one side of church and cemetery is within the corporate limits of the Town of Oak Hill—on the north, another road 100 ft. long is not within the corporate limits. The highway runs within 100 ft. of our church. The funds derived from the state come in part from the A. B. C. Board—other funds come from our part of the Tag Tax and Car Tax—none of which is ear-marked for other purposes. Any further information I will be pleased to furnish upon request."

Our Constitution and laws impose upon municipalities the power and duty to provide and maintain public streets. This is for the safety and convenience of the public as a police power and duty. *Branyon v. Kirk*, 238 Ala. 321, 191 So. 345; *Alabama Traction Company v. Selma Trust and Savings Bank*, 213 Ala. 269, 104 So. 517. Generally speaking, the roads, bridges and streets within the corporate limits of a municipality belong to and are controlled by such municipality. The power, authority and jurisdiction of a municipality in this regard is inherent. Biennial Report of Attorney General 1932-34, page 329.

In view of the above authorities, it is my opinion, that the town council may expend public funds, not specifically ear-marked for other purposes, for the maintenance and improvement of the roads or streets located within the corporate limits of such town, the question of the advisability or necessity of such improvement being a question for the proper municipal authorities. Such being true, it is my opinion that the town council of the Town of Oak Hill may lawfully expend funds now in the treasury of such town for the purpose of improving that portion of the road mentioned in your inquiry lying within the corporate limits of the town. Conversely, it is my opinion that such town council is not authorized to expend funds from the town treasury for the purpose of improving that portion of such road lying without the corporate limits thereof.

The authority of the town council to expend funds for the improvement of that portion of the road lying within the corporate limits of such town would extend both to funds derived from local taxation and funds received from the State, unless such funds be specifically ear-marked for a purpose, or purposes, other than the construction, maintenance and improvement of the roads or streets of the municipality.

Your letter of June 28, 1947, advises me that the funds contemplated to be expended by the town council for the purpose mentioned in your letter were derived from the Alcoholic Beverage Control Board, ad valorem taxation of motor vehicles by the municipality, and the municipality's share of the money collected as motor vehicle and trailer license tax. An inspection of the statutes governing the levying and collection of such taxes, and the distribution of the proceeds derived therefrom, reveal that such funds are not ear-marked for any purpose other than the construction, mainetnance or improvement of the roads or streets of the municipality concerned.

The funds received from the Alcoholic Beverage Control Board are governed by Title 29, Section 11, Code of Alabama 1940, which statute in no way ear-marks said funds for use for any specific purpose.

Any incorporated municipality may, by ordinance or resolution, levy an ad valorem tax upon motor vehicles and, if so desired by the municipality, the tax collector of the county within which such municipality is located shall collect and pay over to the city treasury the proceeds derived from such tax. Such assessment, collection, and distribution is provided for by Title 51, Section 704, Code of Alabama 1940, as amended by Act No. 314, General Acts 1945, page 504. The funds collected and distributed to the municipality under the provisions of this statute are not ear-marked for any specific purpose.

Distribution of funds collected for motor vehicle and trailer license tax is governed by the provisions of Title 51, Section 713, Code of Alabama 1940. This statute provides that a certain designated portion of the funds received by a municipality from this tax shall be used exclusively for the construction, improvement and maintenance of highways or streets. Such statute provides with reference to the distribution of the proceeds of such tax, in pertinent part, as follows:

"* * * Seventy percent to the state and thirty percent to the incorporated city or town in which the owner of the motor vehicle resides. All amounts of motor vehicle and trailer license taxes received by a city or town hereunder in excess of twenty percent of such motor vehicle and trailer license taxes shall be used exclusively for the construction, improvement and maintenance of highways or streets and administrative expenses in connection therewith, including the retirement of bonds for the payment of which such revenues may have been pledged, and for no other purposes. * * *"

Premise considered, it is my opinion that the funds now in the city treasury, derived from the sources indicated by your letter of June 28, may lawfully be expended for the purpose of improving that portion of the road mentioned in your letter lying within the corporate limits of the Town of Oak Hill.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 28, 1947.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Counties—Expenses of Sheriff's Investigation of Crime—

Title 54, Section 5 (4), Code of Alabama 1940; Title 54, Section 11, Code of Alabama 1940; Title 54, Section 9, Code of Alabama 1940; Title 54, Section 10, Code of Alabama 1940.

1. The county is not authorized to pay the travel expenses incurred by the sheriff in securing the chemical analysis of alleged alcoholic beverages, unless the sheriff be acting under the written direction of the Circuit or Deputy Solicitor, Attorney General or Governor and such claim be filed in the manner provided by Title 54, Section 10, Code of Alabama 1940.

2. The sheriff and his deputies are charged with the duty of ferreting out crime and securing evidence and cannot be reimbursed from county funds for money expended in so doing.

3. County may legally pay the travel expenses incurred by the sheriff in conducting a special investigation ordered of him by the Circuit or Deputy Solicitor, Attorney General or Governor.

4. Public officials, when using private automobiles on official business of the State, are entitled to receive five cents per mile as transportation expenses.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of May 1, 1947, is as follows:

"It is sometimes necessary for the Sheriff to have liquor and home brew that he has seized tested for alcoholic content before he can get a conviction for illegal possession or manufacturing.

"In cases of this nature it is necessary for him to make a trip to Auburn for this analysis. Can the County pay the Sheriff mileage for these trips and if so what amount should be paid?"

It is my opinion that the county governing body is not authorized to pay the travel expenses incurred by the sheriff in securing the chemical

analysis of alcoholic beverages, unless the sheriff be acting under the written direction of the Circuit or Deputy Solicitor, Attorney General or Governor and such claim be filed in the manner provided by Title 54, Section 10, Code of Alabama 1940.

Title 54, Section 5 (4), Code of Alabama 1940, provides that:

"It shall be the duty of sheriffs in their respective counties by themselves or deputies to ferret out crime, to apprehend and arrest criminals, and in so far as within their power to secure evidence of crimes in their counties, and to present a report of the evidence so secured to the solicitor or deputy solicitor for the county, or if there is an inferior or special statutory court within the county in which a solicitor prosecutes criminal cases, then to such solicitor."

The sheriff is likewise charged by the provisions of Title 54, Section 11, Code of Alabama 1940, with the promotion of temperance and the suppression of intemperance, such statute providing as follows:

"The sheriffs shall diligently and promptly discharge all duties imposed upon them by all laws of the state for the promotion of temperance and the suppression of the evils of intemperance and by the laws regulating the conduct of the retail beverage business, and shall promptly perform every act which said laws direct or require them to perform."

In the absence of a statute providing for reimbursement of the sheriff for expenses incurred in the performance of his official duties, the county is not liable for the payment of such expenses. The rule is stated in 57 C. J., Sheriffs and Constables, Section 1208, as follows:

"A county is liable to a sheriff * * * for his * * * expenses in connection with enforcement and execution of criminal or penal laws when, and only when, there is an applicable statute so providing; and where the case is within the statute imposing liability on the county, but there is an applicable statutory limitation of the amount of liability, the county will be held liable within, although not beyond, the prescribed limitation."

It is my opinion that a sheriff acting of his own volition in securing the chemical analysis of suspected alcoholic beverages would merely be performing the duty imposed upon him by Title 54, Section 5 (4), supra, "to secure evidence of crimes in their counties." The sheriff and his deputies are charged with the duty of ferreting out crime and securing evidence and cannot be reimbursed from county funds for money expended in so doing. Quarterly Report of Attorney General, Vol. 30, page 102.

However, if the expenses incurred by the sheriff in securing the chemical analysis of the alcoholic beverages were incurred while conduct-

ing a special investigation ordered of him by any one of the officers named in Title 54, Section 9, Code of Alabama 1940, it is my opinion that such expenses may lawfully be paid, if claim for such be presented and approved in the manner prescribed by Title 54, Section 10, Code of Alabama 1940.

Title 54, Section 9, *supra*, provides as follows:

"The sheriffs in their respective counties whenever directed to do so in writing by such solicitors, or by the attorney general or governor, shall make special investigation of any alleged violation of the law in their counties, and shall prepare a written report setting forth what information has been obtained as a result of such investigation together with the names of such witnesses as have been secured with a summary of what can be proven by such witnesses, which report shall promptly, after its preparation, be presented to the official who directed the investigation and if such official be the governor or attorney general he may present it to any solicitor prosecuting criminal causes in the county. The sheriff of the county shall proceed promptly by himself or by a competent deputy of experience and fidelity to make such investigation when directed as aforesaid."

With regard to the payment of the expenses incurred in the conducting of such investigation, it is provided by Title 54, Section 10, *supra*, that:

"The expense of such investigation when so ordered shall be paid from the county treasury, upon a warrant properly drawn; and after the report is made, the sheriff shall file with the board of revenue or court of county commissioners a detailed sworn statement of his expenses accompanied by the written approval of the officer county commissioners shall audit and allow only so much thereof as it shall find reasonably necessary unless it is approved by the governor or attorney general, in which event they shall allow the amount approved; and for such investigation, in addition to his expenses which may include any actual cost of travel that was necessary, the sheriff shall be allowed a fee of four dollars, but if the investigation consumes one day or less, then a fee of two dollars, and the fee and allowed expenses must be paid in each case from the county treasury upon a warrant drawn according to law. Every such solicitor shall direct the sheriff to make such investigation and report when a written request to that effect setting forth the alleged violation of the law is presented to him signed by twenty-five reputable citizens of the county."

It has been held by a former opinion of this office that, under the authority of Title 54, Section 10, *supra*, the county may legally pay for the chemical analysis of alleged prohibited liquors. *Biennial Report of Attorney General, 1932-34, page 324.*

It is my opinion that, under the authority of such statute, the county may also pay the reasonable travel expenses incurred by the sheriff in the securing of such chemical analysis, if such expenses be incurred in the conducting of an investigation ordered of him by competent authority.

It is my further opinion that, if the travel expenses be incurred under the circumstances noted above, the county may reimburse the sheriff for such travel at the rate of five cents per mile.

You will note that Section 10, *supra*, provides for the payment of "actual" cost of travel. It has been held by former opinions of this office, in considering and construing such a provision, that public officials, when using private automobiles on official business of the State, are entitled to receive five cents per mile as transportation expenses. *Quarterly Report of Attorney General*, Vol. 19, page 178; *Quarterly Report of Attorney General*, Vol. 19, page 320.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 28, 1947.

Hon. Phillip J. Hamm,
Commissioner of Revenue,
State Department of Revenue,
CAPITOL.

LICENSE TAX

Title 51, Sections 490, 491, 838 and 839, Code of Alabama, 1940.

1. A person holding a license as a dealer in coffins or caskets under Title 51, Section 491, Code of Alabama 1940, must also procure a license under Title 51, Section 490, Code of Alabama 1940, before engaging in the business of a manufacturer of coffins and caskets, notwithstanding that such manufactured coffins or caskets are used by him in servicing burial policies for his insurance company through his undertaking business.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion, bearing date of May 13, 1947, is as follows:

"An official opinion is hereby requested as to whether or not the following described business is liable for a license under Section 490, Title 51, Code of Alabama 1940.

"This person is engaged in the undertaking business, and as a part of such business services burial policies for his insurance company. He buys and sells caskets and has taken out a license as a casket dealer under Section 491, Title 51, Code of Alabama 1940. He also manufactures caskets, employing only one or two persons in such manufacturing. All caskets manufactured are used in servicing burial policies for his insurance company through his undertaking business."

In my opinion the above described business is liable for a license under Section 490, *supra*.

Title 51, Sections 490 and 491, Code of Alabama 1940, read as follows:

"§ 490. Coffins and caskets; manufacturers.—Each manufacturer of coffins or caskets, one hundred dollars. Provided this license shall not apply to any person who manufactures coffins or caskets without the assistance of any other person or without the assistance of hired labor and which coffins or caskets retail for not exceeding ten dollars. Provided this section shall not apply to local wood-working plants or carpenter shops whose principal business is not the manufacturing of coffins or caskets and who make coffins for paupers for local governing bodies or for charity."

"§ 491. Same; dealers and agents.—Each dealer in coffins or caskets, and each agent or person taking or soliciting orders for retail deliveries of coffins or caskets, in unincorporated places or towns of one thousand inhabitants or less, ten dollars; in towns and cities of over one thousand inhabitants and not exceeding seven thousand inhabitants, twenty dollars; in cities of over seven thousand and not exceeding thirty-five thousand inhabitants, fifty dollars; in cities of over thirty-five thousand inhabitants, one hundred dollars."

The question is whether under the facts stated the described business is liable for a license under Section 490, *supra*.

The fact that a license has been procured under Section 491, *supra*, does not exempt the taxpayer from liability for a license under Section 490, *supra*.

This is provided for in the following sections of Title 51, Code of Alabama 1940, which sections read as follows:

"§ 838. Persons, firms, etc., engaging in several businesses.—Where any person, firm or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, such incorporated company or person shall pay the tax provided by law on each branch of the business."

"§ 839. Two or more licenses on same business.—Wherever in this title two or more licenses on the same business or occupation are

required, it is hereby declared to be the intention of the legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor."

The Supreme Court of this State has defined the word "manufacture" to mean: "to make anything by hand or artificial device." The definition was further illustrated by saying "hence that the making of corn into meal is manufacturing there can be no doubt." *Louisville & Nashville Railroad Company v. Fulgham*, 91 Ala. 555, 8 So. 803.

This holding has been followed in the cases of *Beggs v. Edison Electric Light and Illuminating Company*, 96 Ala. 295, 11 So. 381; and *Curry v. Alabama Power Company*, 243 Ala. 53, 8 So. (2d) 521.

The question may arise that the taxpayer is not a manufacturer of coffins and caskets since he consumes his products in the conduct of his business rather than sells them. The following cases, however, hold that a person is a manufacturer notwithstanding the fact that he consumes and does not sell his finished products:

State v. Soard's Directory Co., 88 So. 251 (La.);

Baltimore & O. S. W. R. Co. v. Cavanaugh, 71 N. E. 239 (Ind.);

State v. Marastoni, 165 P. 1177 (Ore.);

Bubb v. Missouri K & T Ry. Co., 131 P. 575 (Kan.);

New York ex rel Eastern Bermudez Asphalt Paving Co., relator, v. Morgan, 61 App. Div. 373, 70 NYS 516.

The following case sustains the conclusion that the taxpayer is liable for a license under Section 490, *supra*. *Jordan Undertaking Company v. State*, 235 Ala. 516, 180 So. 99.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 28, 1947.

Hon. W. H. MacGregor,
Secretary-Treasurer,
Employees' Retirement System,
Montgomery 5, Alabama.

Employees' Retirement System—Administration of Estates—
Title 7, Sections 661, 665, 694, 695, and 697, Code of Alabama
1940.

1. Funds held by the Employees' Retirement System to the
account of a deceased employee, if set aside by the probate court

to the widow and minor child or children, or either, of such decedent as exempt from administration under the provisions of Title 7, Sections 694-697, Code of Alabama 1940, may be paid to the widow.

2. Before such amount is paid to the widow, she should be required to furnish the Employees' Retirement System with a certified copy of the decree of the probate court setting aside such amount as exempt from administration.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of May 28, 1947, is as follows:

"I am enclosing copies of letters which cover exchange in correspondence with Mrs. Florence E. Hopkins relative to payment by the Board of Control of the Employees' Retirement System of \$81.90 credited to the account of William Hopkins, deceased, with membership in the Retirement System identified by register No. 4827.

"(1) Reference to the copy of our letter of May 23rd shows that Mrs. Hopkins, widow of William Hopkins, deceased, was notified that it would be necessary for her to file application for the return of contributions credited to the account of the deceased as the executor of his estate. She was so advised because Section 5 subsection 6 (a) and (b) of Act 515, approved July 9, 1945, which governs the return of contributions of a deceased member provides in pertinent part as follows:

"(a) Should a member cease to be an employee except by death or by retirement under the provisions of this Act, the contributions standing to the credit of his individual account in the Annuity Savings Fund shall be paid to him upon demand, and in addition to such payment there shall be paid five-tenths of the interest accumulations standing to the credit of his individual account if he shall have not less than three but less than sixteen years of membership service, six-tenths of such interest accumulations if he shall have not less than sixteen but less than twenty-one years of membership service, seven-tenths of such interest accumulations if he shall have not less than twenty-one but less than twenty-six years of membership service, and eight-tenths of such interest accumulations if he shall have not less than twenty-six years of membership service. (b) Should a member die before retirement, the amount of his contributions with such interest as would have been returnable in the case of withdrawal as provided in Paragraph (a) of this subsection shall be paid to his estate, or to such person as he shall have nominated by written designation duly executed and filed with the Board of Control."

"(2) You will observe from reference to the letter of Mrs. Hopkins under date of May 27th that Mrs. Hopkins has been advised by Mrs. Underwood, Chief Clerk, Probate Office, Jefferson County that 'under provisions of Title 7, Section 694, Code of Alabama,' the amount credited to the account of her deceased husband could be returned by the Board of Control of the Employees' Retirement System without requiring her to submit letters of administration showing appointment as executor of the estate of the deceased.

"(3) It will be appreciated if you will let me have your opinion as the legal advisor of the Board of Trustees of the Employees' Retirement System in reply to the following questions.

"(1) May the Board of Trustees of the Retirement System authorize the payment to Mrs. Hopkins, widow of William Hopkins, deceased, the amount credited to his account, register No. 4827 under provisions of Title 7, Section 694, without requiring the said Florence E. Hopkins to file letters of administration as executor of the estate of the deceased?

"(2) If your reply to question 1 is in the affirmative, please advise me as to the procedure to be followed in returning the accumulated contributions of the deceased in accordance with provisions of Title 7, Section 694 of the Code of Alabama."

In addition to the homestead exemption granted in favor of "a widow and minor child or children, or either," under the provisions of Title 7, Section 661, Code of Alabama 1940, additional personal property is exempt from the administration and the payment of debts of the decedent in favor of the "widow and minor child or children, or either," under the provisions of Title 7, Section 665, Code of Alabama 1940. Section 665 is in part as follows:

"In favor of such widow and minor child or children, or either, there shall also be exempt from administration and the payment of such debts, personal property belonging to such decedent at the time of his death, to the amount of one thousand dollars in value, to be selected and set apart for them; * * * "

In the case of *Williamson v. Harris*, 57 Ala. 40, the court held that the term "personal property" includes money as well as other property.

Title 7, Section 694, Code of Alabama 1940 (the statute referred to in your inquiry) is in part as follows:

"When the property, real and personal, owned by a decedent at the time of his death, does not exceed in amount and value the exemption allowed in favor of his widow and minor child or children, or either, and no administration is granted on his estate within sixty days after his death, the probate court of the county in which

he resided at the time of his death, upon the application of the widow, or if there be no widow, or she does not act, upon the application of a suitable person who shall be appointed by the judge of probate as the next friend of such minor child or children, verified by oath and setting forth such facts, as well as the names, condition, and residence, if known, of the heirs of the decedent, other than the minor children of the decedent, must appoint two commissioners who shall make a full and complete inventory and appraisement of the real and personal property of such decedent, describing the property and stating the value of each item or parcel thereof; * * *

If the widow follows the procedure provided for in Section 694, supra, and files a petition with the probate court, the commissioners appointed under said section must make an inventory and appraisement of the real and personal property of the decedent. The \$81.90 held by the Employees' Retirement System to the credit of the decedent should be listed in such inventory as personal property belonging to the decedent at the time of his death.

If the real and personal property of the decedent does not exceed the amount of exemptions allowed in such property, the commissioners must set apart such property to the widow and minor child or children, or either, as exempt from administration, and make a report of their actions to the court. Title 7, Section 695, Code of Alabama 1940.

Under the provisions of Title 7, Section 697, Code of Alabama 1940, if no exceptions are filed to the report of the commissioners, and it is determined by the court "that the property set apart was all the property left by decedent, and that he left less property than was exempt to the widow and minors, the title to the property so set aside, whether real or personal, vests absolutely in the widow and minor child or children, or either, as the case may be."

The widow takes and holds the property so set aside as exempt from administration and payment of the debts of the decedent, impressed with the trust that she will use the same for the maintenance of herself and minor child or children. "The widow receives possession of the exemption; and it must be delivered to her." *Lanford v. Lee*, 119 Ala. 248, 24 So. 578.

In answer to your first inquiry, if the \$81.90 held by the Employees' Retirement System to the account of the decedent is set aside as exempt from administration under the provisions of the above statutes, the Board of Trustees of the Retirement System may authorize that said amount be paid to the widow.

In answer to your second inquiry, before such amount is paid to the widow, she should be required to furnish the Employees' Retirement

System with a certified copy of the decree of the probate court setting aside such amount as exempt from administration.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 29, 1947.

Hon. John M. Gallalee, Chairman,
Board of Registration for Professional Engineers
and Land Surveyors,
702 Washington Avenue,
Montgomery 5, Alabama.

Engineers and Land Surveyors—Licenses—Reciprocity.

The Board of Registration for Professional Engineers and Land Surveyors have authority to negotiate and effect arrangements with appropriate officers of other states to facilitate an exchange or reciprocal registration, provided the provisions of Title 46, Section 148, Code of Alabama 1940, are not violated.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, dated July 1, 1947, is as follows:

“Section 148, Title 46, Chapter 7, 1940 Code of Alabama, provides the following:

“RECIPROCITY. The board may, upon application therefor, and the payment of a fee of ten dollars, issue a certificate of registration as a professional engineer to any person who holds a certificate of qualification or registration issued to him by proper authority of the national council of state boards of engineering examiners, or of the national bureau of engineering registration, or of any state or territory or possession of the United States, or any country, provided that the requirements for the registration of professional engineers under which said certificate of qualification or registration was issued do not conflict with the provisions of this chapter and are of a standard not lower than that specified in Section 140 of this title.

“Section 18 of the State of Missouri Registration Law, as amended by Senate Bill No. 154, provides as follows:

"Section 18. Exchange or reciprocal registration may be granted to any registered architect or registered professional engineer of another state, territory or possession of the United States or of any country, on the same terms and under the same conditions as the officer or officers of such other state, territory, possession or country, authorized by law to register architects and professional engineers, will grant exchange or reciprocal registration to a resident architect or professional engineer registered by the Board; provided, the qualifications and experience of the applicant, as shown by the certificate of the registering authority of such other state, territory, possession or country, are equivalent to the requirements for initial registration in this state. The Board is hereby authorized to negotiate and effect arrangements with the appropriate officers of other states, territories, possessions and countries, to facilitate such exchange or reciprocal registration.

"Based on the above provisions of Section 18 of the State of Missouri Registration Law, the Missouri Registration Board has by letter to this Board requested that negotiations be entered into and arrangements be effected to facilitate such exchange or reciprocal registration as provided for by this Section of the Missouri Law.

"The Board will greatly appreciate your opinion on the following question:

"Does the Board have the authority to negotiate and effect arrangements with appropriate officers of other states to facilitate such exchange or reciprocal registration on the terms of Section 18 of the State of Missouri Registration Law as amended?

"Thanking you for your consideration."

I am of the opinion that your inquiry should be answered in the affirmative, provided the provisions of Title 46, Section 148, Code of Alabama 1940, are not violated.

Title 46, Chapter 7 (Sections 129-150), Code of Alabama 1940, provides for the registration and licensing of engineers and land surveyors. Section 148, *supra*, quoted in your letter of inquiry, authorizes reciprocity of registration of qualified professional engineers of other states, conditioned upon the fact that the requirements for the registration of professional engineers under which said certificate of qualification of registration was issued in another state, does not conflict with provisions of Chapter 7, *supra*, and are of a standard not lower than that specified in Title 46, Section 140, Code of Alabama 1940.

Section 18 of the State of Missouri Registration Law, as amended by Senate Bill, No. 154, quoted in your letter of inquiry, authorizes an exchange or reciprocal registration in the State of Missouri. By virtue of the provision of the Missouri Law or similar laws of other states, and

the provisions of Title 46, Section 148, supra, it is my opinion that your Board has authority to negotiate and effect arrangements with appropriate officers of other states to facilitate an exchange or reciprocal registration of qualified professional engineers, provided the provisions of said Section 148 are not violated.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 29, 1947.

Hon. J. E. Bryan, Superintendent,
County Board of Education,
Jefferson County,
Birmingham 3, Alabama.

SALES TAX—

Building Contract with County Board of Education.

Sales of building materials to contractors for resale or use in the form of real estate are retail sales in whatever quantity sold, and the seller of such materials to the contractor must collect from the contractor the sales tax and report and pay same to the State.

Opinion by Assistant Attorney General Tiller.

Dear Sir:

Your request for an official opinion, bearing date of January 22, 1947, is as follows:

"May I respectfully request an official opinion from you relative to the following, with the approval of the State Building Commission and the State Superintendent of Education:

"The Jefferson County Board of Education entered into an agreement between Daniel Construction Company, Contractor, Birmingham, Alabama, and the Jefferson County Board of Education for the construction of two school buildings in Jefferson County, known as the Powderly-Wenonah Elementary School and the Powderly-Wenonah High School, in accordance with Act #128, State of Alabama, approved June 16, 1945.

"The above named projects are listed as capital outlay projects for the State Building Commission fund allocated to the Jefferson County Board of Education by the State Building Commission. This

list of capital outlay projects having been filed with the State Building Commission and same approved by the State Superintendent of Education on January 21, 1946, and the Technical Director of the State Building Commission on February 21, 1946.

"In the agreement between the contractor and the owner, referred to in the attached agreement (Article #5, Sub-paragraph 'd') - - - - 'Contractor agrees to save owner sales tax, if possible.'

"All invoices and bills for materials, etc., to be used for the construction of these two buildings will be billed for the specific job in the care of the Daniel Construction Company, and same paid by the Jefferson County Board of Education upon presentation, proper audit, and certification.

"The question is as follows: 'Will the contractor be allowed to deduct from each and every invoice or bill for materials, etc., used for the construction of these two buildings, the State Sales Tax of two per cent, provided the amount saved accrues to the owner?'"

The answer to your question hinges on the answer to the question of whether or not the sale of building material to a contractor for use by him in the construction of school buildings is a wholesale sale or a retail sale. In answering this question, recourse must be had to the Sales Tax Law and in particular to Sections 752 and 753, Title 51, Code of Alabama 1940. Section 753 levies a tax in the following language:

"There is hereby levied, * * * * and shall be collected as herein provided, a privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows: (a). Upon every person, firm or corporation engaged, or continuing within this State, in business of selling at retail any tangible personal property whatsoever, * * * * , an amount equal to two percent of the gross proceeds of sales of the business."

Section 752 defines the terms used in the Sales Tax Act and Subsection (j) thereof defines the term "sale at retail" or "retail sale" in the following language:

"(j). The term 'sale at retail' or 'retail sale' shall mean all sales of tangible personal property except those above defined as wholesale sales. The quantities of goods sold or prices at which sold, are immaterial in determining whether or not a sale is at retail. Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold." (Emphasis ours.)

It will be noted that the last sentence in this quotation defines sales of building materials to contractors for resale or use in the form of real

estate as retail sales. However, it appears that there has been and still is some confusion with respect to the proper interpretation of this particular provision of the Sales Tax Law as applied to contractors or builders.

The contract attached to your letter specifically provides that the contractor shall furnish all labor and materials in the construction of the school buildings in question. The contractor must, therefore, purchase such materials as may be necessary in and about the construction of said buildings. Are the sales of such building materials to him retail sales and subject to the sales tax or are they wholesale sales and exempt from the sales tax and, if the latter, does he in the performance of his building contract sell the material to the Jefferson County Board of Education? It is the writer's opinion, and he holds, that the sale of the building materials to the contractor is the "ultimate sale" or the "retail sale" and that the State of Alabama will have to look to the vendors who sold such building materials to the contractor for the sales tax. However, because of the confusion that apparently prevails with respect to this question, we believe a review of a few of our own cases as well as some of the cases from other states might be helpful.

When tangible personal property is sold by a vendor to a contractor and said personal property is used by him in the construction of a building, such tangible personal property becomes by its use real estate, and the title thereto passes into the landowner by operation of the contract (by accretion). Such sale to the contractor is regarded by the majority of the courts as a retail sale, and constitutes the incidence upon which the sales tax is based. In other words, such sale to the contractor is the ultimate sale, and the use of the property by the contractor in the performance of his contract does not constitute sale of the property by him to the landowner but such property is used or consumed by him in the performance of his contract. This conclusion is amply borne out by our own cases and those from other jurisdictions from which we now quote:

In the case of *Wood Preserving Corporation v. State Tax Commission*, 179 So. 254, appellant filed suit for a declaratory judgment, praying that the Court ascertain whether or not it was liable for a sales tax on cross-ties, pilings, bridge timbers, telephone and telegraph poles, and cross-arms, which it had sold to consumers in carload lots, or in larger quantities, complainant's position being that it was a producer and processor in carload lots, and larger quantities, or creosoted cross-ties, etc. In answer to this contention the State averred that the complainant, after subjecting said material to the creosoting process, sold same to consumers, contractors, or landowners for use in the form of real estate, and that such sale was a retail sale within the meaning of the Sales Tax Act, etc. It was insisted by the complainant that the words in quotation, "building materials," were limited to materials used in the construction of buildings—such as lime, plaster, lumber, nails, etc., and that the term had never been applied to cross-ties, cross-arms, telephone and telegraph poles, etc. The Supreme Court, in opinion written by Mr. Justice Knight, disagreed

with the contention of the complainant and appellant, and construed the words, "building material," as follows:

"We are fully persuaded that appellant's learned counsel has rather confused the word building, employed as an adjective, in the exception to exemptions, with the same word when used as a noun. The materials used in building a railroad, a bridge, a telephone or telegraph line, a dam or fence, is building material. In fact the term 'building material' as employed in the exception is sufficiently comprehensive to include materials of all kinds used in construction work. And we are fully persuaded that the lawmakers, in framing the act in question, and in employing the term, intended it should be given the meaning as above stated. To say that the Legislature intended to confine the term building material to only such material as might be used in constructing a building with sides and covering would unduly narrow the true meaning of the exception. *Lone Star Cement Corporation et al. v. State Tax Commission et al.*, supra."

The Court, after quoting from the Sales Tax Act to the effect that "sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold," held as follows:

"We are fully persuaded that building materials used in the construction of highways, bridges, railroads, telegraph and telephone lines, fall within the class of material comprehended in subsection (i), section 1, of the act, and that upon such sales the tax is imposed. *Lone Star Cement Corp., et al. v. State Tax Commission et al.*, supra.

"We are of the opinion, and hold, in line with the great weight of current authority, that cross and switch ties, piling, bridge timbers, telephone and telegraph poles and cross-arms, when annexed to the soil, for the purposes for which suited, and for which they were manufactured and sold, become fixtures and a part of the freehold. *Jones v. New Orleans & Selma R. Co. and Immigration Ass'n.* 70 Ala. 227; *Van Keuren v. Central R. Co. of New Jersey*, 38 N. J. L. 165; *Tonkawa Petroleum Corp. v. Golden Rule Refining Co.*, 159 Okl. 3, 11 P. 2d 140; *City of New Haven v. Fair Haven & W. R. Co.*, 38 Conn. 422, 9 Am. Rep. 399; *Missouri P. Ry. Co. v. Bradbury*, 106 Mo. App. 450, 79 S. W. 966; *Union Pacific R. Co. v. Board of Commissioners*, 114 Kan. 156, 217 P. 315; *American Union Tel. Co. v. Middleton*, 80 N. Y. 408; *Streator Ind. Tel. & Tel. Co. v. Interstate Ind. Tel. & Tel. Co.*, 142 Ill. App. 183, 185; *Western Union Tel. Co. v. Tennessee*, 9 Baxt., Tenn., 509, 40 Am. Rep. 99."

In the much discussed case of *Layne Central Co. v. Curry*, 8 So. (2d) 839, the question at issue was whether or not the contractor, Layne Central Company, was liable for use tax on building material used by it in constructing pump houses, well connections, and pipe lines for Hollingsworth & Whitney Company. The tax was levied under Section 788. Mr.

Justice Foster wrote the opinion for the Court, and he called attention to the fact that the Use Tax Act is complementary of the Sales Tax Act. In doing so, he uses this language:

"But the purpose is to create a system of taxation by having a use tax integrated with the sales tax bearing equally whether the transaction may involve interstate commerce or not. Such a tax has been held not to violate the commerce clause of the Federal Constitution. *Henneford v. Silas Mason Co.*, 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814; *Southern Pacific Co. v. Gallagher*, 306 U. S. 167, 57 S. Ct. 389, 83 L. Ed. 586."

Mr. Justice Foster also calls attention to the fact that appellant was a foreign corporation, and in performing its contract was bound to and did furnish all equipment, labor, material, and machinery needed, and that much of the property used was purchased by appellant outside the State of Alabama. Two questions were decided by the Court, the first being that the use by the contractor of the property in the performance of his contract was a taxable incident—and that that was true notwithstanding the fact the property constructed by it under its construction contract, when completed, formed a part of a manufacturing establishment. It had used the property in the performance of its contract, and the exemptions provided by the statute of machinery sold to manufacturers did not apply to it. However, we are here more particularly interested in the second question decided by the Court—that is, that tangible personal property used by a contractor in the performance of its contract in the construction of buildings, etc., upon real estate, becomes a part of the real estate by accretion, and the use of it by the contractor is the ultimate use or consumption and, therefore, the taxable event. We quote:

"There is another theory on which this levy was within the statute. When ownership of the pump houses, well connections and pipelines as completed structures was acquired by Hollingsworth & Whitney Company it was not by virtue of a retail sale as defined in section 787, supra, of personal property whose use is taxable except as exempt under section 789 (q), but by virtue of a contract to add a structure to real estate. Hollingsworth and Whitney Company did not buy machines from appellant to be used by it in manufacturing tangible personal property, exempt under section 789 (q), supra; neither did appellant manufacture tangible personal property with that material as an operating machine. Section 789 (q), supra. But the transaction under which the material constituting the ingredients of those appliances was acquired by appellant was a 'sale at retail,' as defined by the statute. For 'sale of building materials to contractors * * * * * for * * * * use in the form of real estate are retail sales in whatever quantity sold,' Section 787 (e) of the Code, supra; *Lone Star Cement Corporation v. State Tax Commission*, supra; *Wood Preserving Corp. v. State Tax Commission*, supra, and are not affected by Section 789 (q), supra. Such was this transaction."

In the case of *Lone Star Cement Corporation et al. v. State Tax Commission et al.*, 175 So. 399, the question involved was as to whether or not cement, which was sold by the company to and used by the purchasers in building or constructing roads, streets, highways, embankments, viaducts, bridges, buildings, and other things of a similar character, was taxable under the Gross Sales Tax Act, known as the Alabama Luxury Tax Act. After quoting from the act the part dealing with sales of building materials to contractors, etc., the Supreme Court said:

"This subsection clearly discloses a legislative intent to make gross receipts from sales of commodities which are consumed by the purchaser or so used as to destroy such commodity as a constituent element of 'tangible personal property,' the resale of which is itself subject to the tax, a basis of computation of the tax. * * * The purchasers in these classes are the ultimate consumers and the legislative intent is to make the sale to the consumer the basis for computing the tax. *State v. Christhlf*, 170 Md. 586, 185 A. 456.

"In truth and in fact the tax can well be denominated a consumer's tax."

It will be observed that Mr. Justice Brown, in the opinion last above quoted from, referred to the case of *State v. Christhlf*, 185 A. 456, in support of the conclusion announced by the Court. In the opinion of the Maryland Court, there were two cases consolidated. In the first of the two cases—that is, the *Christhlf* Case—there was involved the construction of a road, the estimated cost of the materials entering into the construction thereof being something over \$106,000.00; and it was upon the cost of these materials the State had based its tax, the opinion saying:

"The assessed price of materials was their cost to the contractors, and was also the selling price, if there was a sale by the contractors to the state."

In the second case, the Consolidated Engineering Company, Inc., was the contractor and had contracted with the Board of Regents of the University of Maryland for the erection of an arts and science building at College Park, for something over \$259,000.00. The comptroller made an assessment for materials entering into the structure since the effective date of the act on the basis of something over \$133,000.00; and, in each of the cases the State demanded the tax on the theory that the defendants sold the materials which went into the contracts at retail, but the Supreme Court disagreed with the State's contention in that regard. The Court held that the decision turned not only upon the meaning of the word "retail" but also upon the character of the property when it finally landed in the possession of the ultimate owner. The Court said:

"The decision in these cases not only turns on the meaning of the word 'retail' but also on the character of the property when it

finally lands in the possession of the ultimate owner, and it makes no difference whether he is called a consumer or user."

The Court then quotes from an Illinois case to the effect that the definition of a "sale at retail" as "any transfer of the ownership of, or title to, tangible personal property," is broad enough to cover the transfer of title made by a contractor who attaches tangible personal property to real estate in accordance with a contract, but states that it cannot agree with that theory. We quote:

"Much as we respect that court, we cannot agree with the view that there is a transfer of title to so many feet of lumber, kegs of nails, thousands of brick, perches of stone, cubic yards of concrete, or other items of materials entering into a lump sum contract, for a complete job or structure, which, when erected on the customer's land is as much real property as the land itself and is by no sort of definition or reasoning 'tangible personal property.' State v. J. Watts Kearny & Sons, 181 La. 554, 160 So. 77; 23 R. C. L. 1233, Sales, Sec. 49.

"It is the contractor or builder who is the ultimate user or consumer of the materials which in one of these cases are converted and fabricated into a building and in the other into a road. In principle there is no difference between the two kinds of structures. Nor do we see the application of the case of the cobbler cited by the state in *Western Leather and Finding Company v. State Tax Commission* (Utah) 48 P. (2d) 526, for whether the shoes are new or repaired, they are still tangible personal property. More in line with the views of this court is the case of *York Heating & Ventilating Company v. Flannery*, 87 Pa. Super. 19, where it was said of the installation of a blower and heating system by contract: 'The contract in suit was in no sense a contract of sale. It was a construction contract. * * * It would be just as proper to call the contract for the construction of a building a sale of the stone, brick, cement, wood, etc., which entered into the erection of the building.'"

In the case of *Atlas Supply Co. et al. v. Maxwell*, 194 S. E. 117, 212 N. C. 624, supra, the act required wholesale and retail merchants to pay a sales tax as a license or privilege tax upon the sale, within that State, of tangible personal property; and the act further provided that the sale of any article of merchandise by any wholesale merchant to anyone other than a merchant for resale should be taxable as a retail sale; and the word "sale" was defined as "any transfer of the ownership or title of tangible personal property for any kind of consideration," etc. It further appears that there was a tax on a wholesale sale as well as a retail sale, the tax on the wholesale sale being much less than the tax on the retail sale. The appellant filed a bill for a declaratory judgment in which it sought to have its sales to heating and plumbing contractors declared to be wholesale sales, and to have such contractors engaged in fulfilling lump-sum contracts denominated merchants within the meaning of the act,

on the theory that they buy the heating and plumbing materials, incorporate them in heating and plumbing systems, and transfer title thereto to the owners of the buildings. The Court says this argument is ingenious, and finds support among some of the authorities, but that the Court was unable to accept plaintiff's view as a proper interpretation of the statute. We quote:

"A manufacturer buys raw materials, uses them in producing the finished product which he sells, but it would hardly be contended that he buys the raw materials for resale. Certainly not in the ordinary acceptation of the term. They are to be used for manufacturing purposes. *Boyer-Campbell Co. v. Fry*, 271 Mich. 282, 260 N. W. 165, 98 A. L. R. 827. So it is with heating and plumbing contractors who buy materials and supplies for use in fulfilling lump-sum contracts. They purchase the materials and supplies, not for resale as tangible personal property, but for use in producing the turnkey job. There is no resale of the materials and supplies, as such, either actual or intended, within the meaning of the act. 23 R. C. L. 1233."

In the case of *Albuquerque Lumber Co. v. Bureau of Revenue of New Mexico et al.*, 75 P. (2d) 334, 42 N. M. 58, plaintiff conducted a department of its business known as the heating and supply department, and from such department made sales of supplies, including bathtubs, closet combinations, kitchen sinks, laundry tubs and accessories, water pipes, valves, fittings, soil pipes, boilers, radiators, hot water heaters, and accessories thereof. It was contended that said articles were sold only to plumbing and heating contractors, who purchased such supplies from plaintiff exclusively for the purpose of placing and installing said merchandise in the buildings, edifices, and premises of others. The Bureau of Revenue required plaintiff to pay, and plaintiff did pay under protest, an amount equal to two per cent (2%) of the gross proceeds of such business on defendant's theory that plaintiff was engaged in the business of selling such commodities at retail. Plaintiff brought suit to recover the difference between what it would have had to pay as a wholesale merchant and what it had paid as a retail merchant. The State demurred to the complaint on the ground that the sales were retail sales and not wholesale sales. The district court overruled the demurrer and judgment was rendered against the defendant, the State. The State appealed and the Supreme Court reversed. The Supreme Court referred to, and quoted from, quite a few cases from other jurisdictions. One of these was the case of *Commonwealth v. Gormly*, 173 Pa. 586, 34 A. 282. The Pennsylvania Court held as follows:

"A plumber who, in putting in steam and water heating apparatus, buys the necessary articles and materials from dealers in plumbing materials; works himself, employing other plumbers to help; gets paid by charging for the labor and adding a percentage to the cost of the materials; has no place of business but his workshop, and does not do business as a buyer and seller; —is not a

'dealer in goods, wares and merchandise,' within the meaning of the laws imposing mercantile license taxes."

In reaching this conclusion, the Court said:

"In the present case the defendant is neither a 'manufacturer' nor a 'dealer,' in the strict sense of the latter term. He does not buy to sell the articles he uses; he does not sell them, in the literal sense; and he only buys them when he has a job of work to do for which he requires them. As between the dealer and himself, he is the consumer. He needs the articles in his business. He puts them into buildings, putting his own work upon them; but when they are placed there they are not in the same shape as when he received them, but as a compact whole, composed of all the materials required for the purpose, no matter from what source he obtained them. For instance, a complete steam heating apparatus requires boilers, radiators, pipes, valves, one or more furnaces, and other articles, to make a complete work. Some of these things might be obtained from one dealer and others from other dealers; but the ultimate thing which the defendant supplies to his customer is not the thing he bought. His own work, too, must be added, —a necessary and expensive part of the completed whole, as all persons know who have such bills to pay. How, then, can it be said that such a person is a dealer when the thing which he sells is not the thing which he buys?"

It will also be noted that the New Mexico Supreme Court also quoted from the *State v. J. Watts Kearny & Sons* case 181 La. 554, 160 So. 77, 78, as follows:

"A contractor who buys building material is not one who buys and sells—a trader. He is not a 'dealer,' or one who habitually and constantly, as a business, deals in and sells any given commodity. He does not sell lime and cement and nails and lumber.

"His undertaking is to deliver to his obligee some work or edifice or structure, the construction of which requires the application of skill and labor to these materials so that, when he finishes his task, the materials purchased are no longer to be distinguished, but something different has been wrought from their use and union. The contractor has not resold but has consumed the materials. Sales to contractors are sales to consumers."

The New Mexico Court also quoted from several other cases from which we have already quoted hereinabove, and to which reference is here made.

In the case of *Hurlihy Mid-Continent Co. v. Nugelman*, 12 N. E. (2d) 638, Ill., the plaintiff was a contractor employed by the Sanitary District of Chicago to construct concrete sewers and tunnels and to build a sewerage treatment works. The contract recited that it was for work

and labor, and there were two kinds of materials used: (1) temporary materials used in scaffolding, etc., which did not go into the permanent structure: (2) materials consumed in the construction of the permanent structure—sand, cement, gravel, reinforcing steel, etc. The lower court ruled that the first kind of material was not taxable, as it remained the property of the plaintiff, but held that the other was taxable. The tax involved was an occupation tax upon a class of vendors, and not a sales tax; and the tax was levied on the gross receipts from sales. In this case, the Supreme Court of Illinois held as follows:

"There was no transfer of tangible personal property within the meaning of the Act by plaintiff to the Sanitary District of Chicago, and plaintiff was not subject to the tax."
There was a dissenting opinion.

Other Alabama cases bearing upon this question are the cases of *King and Boozer v. State*, 3 So. (2d) 517, s. c. *State of Alabama v. King and Boozer*, 62 S. Ct. 43, 314 U. S. 1; and *United States, et al., v. Curry, Commissioner of Revenue*, 3 So. (2d) 582, s. c. *Curry v. United States, et al.*, 314 U. S. 14, 62 S. Ct. 48. This opinion is already too long and to discuss these cases at length would probably serve no useful purpose. However, we will add that, in the *King and Boozer* case, *supra*, the State of Alabama was proceeding against King and Boozer, the vendor of the lumber in question, and not against the contractor. Surely the State could not have done this had the sale of lumber by King and Boozer to the contractor been other than a retail sale. Since it was a retail sale, then King and Boozer were required by the Sales Tax Law to collect the sales tax from the contractor and to report and pay same to the State. The vendors in this instance are under like duty to collect the sales tax from Daniel Construction Company and report and pay same to the State; and this liability would rest upon the vendors even though they failed to collect the tax from the said construction company. See authorities, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 31, 1947.

Honorable Luther Davis,
Chairman of the Commission Board,
City of Tuscaloosa,
Tuscaloosa, Alabama.

MUNICIPALITIES—WATER WORKS—TITLE 37, SECTION
363, CODE OF ALABAMA 1940.

Municipalities which own and operate waterworks plants have authority to furnish, under contract, water to the inhabitants of the territory surrounding the corporate limits of such municipalities.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, dated March 20, 1947, is as follows:

"The City of Tuscaloosa owns and operates its own municipal waterworks system. The residents of an unincorporated community located about seven miles beyond the corporate limits of the city have requested the city to extend its water mains and supply them with water or permit them to construct their own water main and connect with the city's water main at a point within the police jurisdiction of the city.

"I would like for you to let me have your opinion in answer to the following questions:

"1. Does the city have authority to extend its water mains and supply water to consumers outside the corporate limits but within the police jurisdiction of the city?

"2. Is the city authorized to extend its water mains and furnish water to consumers beyond the police jurisdiction of the city, and if so, how far beyond?

"3. If the people beyond the police jurisdiction of the city should construct and own their own water main to a point within the police jurisdiction of the city, will the city be authorized to supply them with water through their own main and collect from them individually or supply them with water at the points where their main connects with the city's main within the police jurisdiction of the city and collect for the total aggregate of the water supplied to their main at a point within the police jurisdiction?"

Answering your inquiry, I call your attention to Title 37, Section 363, Code of Alabama 1940, which is as follows:

"Cities and towns may construct or purchase and operate waterworks plants, such plants may be within or without such city or town. Such plants may be purchased subject to incumbrances, and to contract to furnish water therefrom, the payments and performance of which may be assumed. Such cities or towns may furnish, under contract, water to the inhabitants thereof, and to the inhabitants of the territory surrounding such city or town." (Emphasis Supplied)

So far as I have been able to find, the courts of this state have not defined the phrase "surrounding territory."

The word "adjacent" is defined by Webster and other lexicographers to mean "to lie near," "close" or "contiguous." It is sometimes said to

be synonymous with "adjoining," "near," "contiguous." In some decisions, courts have held it to mean "in the neighborhood" or "vicinity of"; in others, "adjoining" or "contiguous to."

That which is "adjacent" may be separated by some intervening object; that which is "adjoining" must touch in some part, while that which is "contiguous" must touch entirely on one side.

People v. Keechler, 194 Ill. 235, 62 N. E. 525.

Baxter v. York Realty Co., 112 N. Y. S. 455, 128 App. Div. 79.

"Surrounding" is defined by Webster to mean "encircling," "enveloping," "circumjacent."

In the case of **Birmingham Electric Co. v. City of Bessemer**, 237 Ala. 240, 186 So. 569, the Supreme Court had occasion to italicize the phrase "and surrounding territory" in construing the power of a city to contract for the furnishing of electricity to the city or town and surrounding territory as provided by Title 37, Section 360, Code of Alabama 1940. The city of Bessemer proposed the construction of an electric transmission line leading from the city of Bessemer to connect with a transmission line operated by T. V. A., at a point approximately 50 miles north of Bessemer, and proposed to operate said power line and distribution system to serve patrons within and without the city of Bessemer and within the "Birmingham Metropolitan Area," and to the inhabitants of Tarrant City, and others outside of said municipalities. The Supreme Court held that such proposed acts were not ultra vires of the city's corporate authority and, as I have said before, italicized the phrase "and surrounding territory" as that term is used in Title 37, Section 360, supra.

In the case of **Alabama Water Co. et al v. City of Anniston**, 223 Ala. 355, 135 So. 585, the Supreme Court held that the city of Anniston had power and authority to purchase, own and operate waterworks serving customers "within and without" the city limits. The term "within and without" is broader than such terms as "adjacent," "adjoining," "contiguous" or "surrounding."

The power of municipalities under Title 37, Sections 360 and 363, Code of Alabama 1940, to provide water systems, imparts the discretion requisite to its exercise, with which the courts cannot interfere, except for fraud or palpable abuse of such discretion. **Pilcher v. City of Dothan et al.**, 207 Ala. 421, 93 So. 16.

The Supreme Court of Alabama in the case of **Atkison v. City of Gadsden et al.** 238 Ala. 556, 192 So. 510, held that the Water Works Board of the city of Gadsden, organized under Act No. 228, General Acts, Extra Session 1936-37, page 274 (Title 37, Section 394, Code of Alabama 1940), had power and authority to supply water not only to the inhabitants of the municipality but to the "surrounding territory."

The statutory law governing municipalities authorizes cities to perform many governmental acts and functions beyond the corporate limits. Express authority is conferred on municipalities to sell water to other municipalities and to the inhabitants of such other municipalities. The statutory law governing municipalities in such instances is found in Title 37, Section 360 et seq., Code of Alabama 1940.

It is my opinion that the first two inquiries must be answered in the affirmative.

Answering your third inquiry, it is my opinion that under the broad powers given a municipality by virtue of Title 37, Section 363, supra, such city has authority to furnish water, under contract, to the inhabitants of the territory surrounding such city and may work out any system for supplying such water it deems most practicable in this regard.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 31, 1947.

Hon. D. G. Gill, M. D.,
State Health Officer,
Department of Public Health,
CAPITOL.

Tourist Courts—Police power to regulate.

1. It is within the police power of the state to regulate tourist courts in the interest of public health, morals, safety or general welfare.

2. It is within legislative competence to determine the factual need of regulating tourist courts in the interest of public health, morals, safety or general welfare.

3. Provisions restricting the occupancy of rooms to one time within a single period of 12 hours is constitutional provided its purpose is to subserve public health, morals, safety or general welfare, and provided further that a factual needs exists.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of July 22, 1947, is as follows:

"Attached is a copy of a bill to regulate tourist camps which has been introduced in the House of Representatives and about which

there is a question. It is whether the section prohibiting the rental of a cabin under twelve hours is constitutional.

"It will be appreciated if you will rule on this point and let me have your opinion as early as convenient."

Reference is made to your recent communication in which you enclosed a copy of a bill which proposes to regulate tourist camps. You directed my attention to a provision thereof and asked if it is constitutional. The provision is as follows:

"The same room, cabin, cottage or quarters in a tourist camp, motor court, or motel shall not be rented or occupied more than once in a single period of 12 hours * * * *."

The constitutionality of this provision depends upon the authority of the legislature to exercise the police powers of the state in restricting the use of property in the manner proposed. The exercise of such power "is not subject to definite limitations, but represents state's reserve power, which is at all times coextensive with necessities of the case and safeguard of public interest." *Franklin v. State, ex rel. Alabama Milk Control Board*, 169 So. 295, 232 Ala. 637.

The police power is not paramount to the constitution, yet its exercise is never interfered with unless "plainly in conflict with higher law." *Pickett v. Matthews*, 192 So. 2d. 261, 238 Ala. 542.

Each state has the power to regulate relative rights and duties of all persons, individuals, and corporations within its jurisdiction for public convenience and public good, subject only to limitations that such regulation is not proven repugnant to provisions of state or national constitutions; and the test is whether the limitations imposed go no further than to throw reasonable safeguards around public interest. The lawmaking authority may not, under the guise of "police power," impose unnecessary and unreasonable restrictions on use of private property or pursuit of useful activities, but the restrictions imposed must bear some substantial relation to public need or general welfare.

The copy of the bill which you enclosed is silent as to the purpose of the proposed regulations. If it be a fact that this purpose is to safeguard the health of the occupants of the rooms, or to prevent the use of such rooms for immoral purposes, or in any manner to subserve public need, or to promote the general welfare, and if either objective is consonant with a factual need that has a relationship with the occupancy of the rooms in a tourist camp, then in such instance the provision is constitutional. This question is addressed to the Legislature. *Alabama State Federation of Labor v. McAdory*, 18 So. 2d. 810, 246 Ala. 1, Certiorari granted, 65 S. Ct. 191, 323 U. S. 703, 89 L. Ed.—Certiorari dismissed, 65 S. Ct. 1384, 325 U. S. 450, 89 L. Ed., wherein the following appears:

"The police power casts on Legislature function of ascertaining and determining when welfare of the people needs its exercise, and although the power is not paramount to the Constitution, its exercise is never interfered with unless plainly in conflict with Constitution."

It is further said in *Equitable Loan and Security Company v. Town of Edwardsville*, 38 So. 1016, 143 Ala. 182, 111 Am. St. Rep. 34, as follows:

"It belongs to the Legislature to determine primarily what measures are appropriate or needful for the protection of public morals, health or safety, subject to the power of the courts to adjudge whether any particular law is an invasion of constitutional rights."

Also in the case of *Edge v. City of Bessemer*, 51 So. 246, 164 Ala. 599, 26 L. R. A. (N. S.) 394, as follows:

"A statute purporting to have been enacted in the exercise of the state's police power, which in fact has no real relation to the public health, morals or safety, or invades constitutional rights, is invalid."

So, if in fact the proposed provision has a real relation to public health, morals, safety or general welfare it is valid, otherwise it is invalid. A factual determination of this relationship is addressed to the Legislature. My suggestion is that an interpretative section be added to the end that the purpose of the regulations may be made clear.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 1, 1947.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham 3, Alabama.

Corporations—Taxation—Exemptions—Alabama Federation of Women's Clubs—

Title 10, Sections 139-150, Code of 1940—Title 51, Section 2 (d), Code of 1940.

Property of Alabama Federation of Women's Clubs, incorporated either as a social club or society for public improvement, is not exempt from ad valorem taxation.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of May 21, 1947, is as follows:

"The Alabama Federation of Women's Clubs were chartered the 24th day of July 1924, and their charter reads as follows:

"CERTIFICATE OF INCORPORATION ALABAMA FEDERATION OF WOMEN'S CLUBS

"To the Honorable D. W. Crosland, Judge of Probate of Montgomery County.

"The signers of this certificate are members of an educational and benevolent society known as the Alabama Federation of Women's Clubs, are each over the age of twenty-one years and are all residents of the State of Alabama. This certificate is being filed under authority of a resolution duly adopted by said Alabama Federation of Women's Clubs, signifying the intention of said society to become an incorporated body.

"The signers hereof have been duly elected trustees of said Alabama Federation of Women's Clubs and desire the incorporation of said society under the laws of the State of Alabama. The official place of business is to be in Montgomery, Alabama, and the County in which corporation is to exercise its official function is Montgomery County, Alabama. The said trustees hereby declare the name selected for the corporation to be Alabama Federation of Women's Clubs.

"The general purpose of the corporation is to foster and encourage a development of the fine arts in the State of Alabama; to promote the advancement of the people of the State along social, educational and all other lines conducive to the betterment of conditions within said State; to exercise all functions incident to the improvement of club life among the women of said State; to receive property by gift, will, devise, or purchase and to hold said property for the benefit of said corporation; to have the right to alien, dispose of or mortgage any or all of said property for the benefit of said corporation as may, in the judgment of its trustees, seem wise when voted and approved by two-thirds of the Board of Trustees then in office, the action of said Board to be recorded in the minutes of said corporation; to have successors of the present Board of Trustees, said successors to be elected by the corporation at its regular annual meeting. Said corporation shall have all the powers now granted or hereinafter to be granted by the laws of the State of Alabama to corporations of this nature and such other powers as are incident to private corporations.

"We and each of us, as trustees of said corporation, certify to the foregoing certificate under our hands and seals this the 24th day of July, 1924:"

"Eighteen signatures follow the last paragraph of this charter.

"The women of the Third District of the Alabama Federation of Women's Clubs, which includes 180 clubs, are considering the purchase of a piece of property in Birmingham where their meetings may be held without having to pay some hotel or other institution for the meetings.

"The building will be used as a club house for any and all of the 180 clubs, for entertainment of the youth of the Birmingham district in an effort to curb juvenile delinquency, and for other purposes as stated in the charter.

"The two members of the committee, namely, Mrs. Alma C. Phillips and Mrs. Dan Martin, called on me today to ascertain if under their charter, and under the proposition stated above, the building would be exempted from taxation. They assure me that this is a non-profit organization in every respect.

"With these facts before you, will you please advise me whether or not I may exempt this building from ad valorem taxes. Inasmuch as these ladies are at the present in the process of dealing for the property, a prompt reply will be appreciated by both the Federation and the writer."

It is my opinion that the building in question will not be exempt from ad valorem taxation.

In an opinion of this office, reported in Quarterly Report of Attorney General, Vol. 33, p. 104, it was held that social clubs and societies incorporated under Title 10, Chapter 7, Article 5 (Sections 139-149), Code of Alabama 1940 (formerly Sections 7176-7189, Code of Alabama 1923), and public improvement societies, generally, incorporated under Title 10, Chapter 7, Article 4 (Section 150), Code of Alabama 1940 (formerly Sections 7190-7192, Code of Alabama 1923), or under prior similar acts of legislation, are no longer exempt from ad valorem taxation. Said opinion traced the legislative history of the statutory provisions involved. The holding was based on the theory that the exemptions granted in the original acts authorizing the creation of such corporations, and in the 1923 codification thereof, were repealed as such exemptions were omitted from the Code of 1940.

The corporation under consideration was organized in July, 1924. From the nature of the petition, it was evidently incorporated under either of the provisions of the 1923 Code, above noted. Therefore, the holding of the above cited opinion is applicable thereto, and the property of said corporation is not now exempt from ad valorem taxation by virtue of

any exemption heretofore specifically granted at the time of its incorporation.

Exemptions for taxation are strictly construed in favor of the taxing power and against the taxpayer.—*Bowman v. State Tax Commission*, 235 Ala. 190, 196 So. 216. The corporation under consideration does not, in my opinion, come within the operation of Section 91 of the Constitution of 1901, exempting property used exclusively for religious worship, schools or purposes purely charitable, nor within the influence of Title 51, Section 2 (d), Code of Alabama 1940, exempting the property of literary and scientific institutions and literary societies, when employed in the business of such institution. In my judgment, said corporation is not such a literary or scientific institution or society as to come within the purview of this exemption from ad valorem taxation.—*Quarterly Report of Attorney General*, Vol. 33, p. 104, supra.

From the foregoing it follows that the property of the Alabama Federation of Women's Clubs, now owned or hereafter acquired, is not and will not be exempt from ad valorem taxation under the present laws of this State.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 7, 1947.

Hon. Tom C. Garner,

Judge of Probate,

Jefferson County,

Birmingham 3, Alabama.

~~Mortgages—Exemptions—Banks—Filing Tax—~~Act No. 181, H. 214 (M.S.), Approved July 22, 1947—Title 51, Sections 618-619, Code of Alabama 1940.

1. Act No. 181, H. 214 (M.S.), approved July 22, 1947, is applicable only to mortgages, deeds of trust, contracts of conditional sale, or other instruments of like character which are given as security for payment of any debt, and is only applicable to the privilege or license tax as set out in Title 51, Section 619, Code of Alabama 1940.

2. Act No. 181, H. 214 (M.S.), approved July 22, 1947, is not applicable to deeds and other instruments as set out in Title 51, Section 618, Code of Alabama 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of July 31, 1947, is as follows:

"Re: Act No. 181, H-214—Pinkston. Approved July 22, 1947.

"Referring to the above Act, and telephone conversation with you this morning by my chief clerk, I respectfully request your official opinion in regard to the following:

"Does this Act refer to all instruments made to a bank or banking institution doing business in Alabama? The Act refers to **mortgages of whatever kind**. Would a deed, conditional sales agreement, or any other instrument made to a state bank or banking institution, be exempt from mortgage tax.

"Thanking you for an early reply and with best wishes, I am,"

In answer to your request you are advised that Act No. 181, H. 214 (M. S.), approved July 22, 1947, only exempts those instruments set out in Title 51, Section 619, Code of Alabama 1940, from the privilege or license tax therein set out.

Section 2 of this act reads as follows:

"No tax as levied by the state in the recording of mortgages of whatever kind filed for record in the Probate Court in any county in the state shall be levied upon or collected from any Bank in this State unless the said tax shall be applicable to and collected from all banks and banking institutions doing business in the State of Alabama."

It is to be noted that the exemption granted by Section 2 herein above set out only applies to **mortgages**, and has no application to deeds, bills of sale or other instruments of like character which convey any real or personal property.

As you are aware, there are separate provisions made in the Code levying a privilege or license tax on deeds and instruments of like character and on mortgages or instruments of like character. The privilege tax applicable to deeds and other like instruments is set out under the provisions of Title 51, Section 618, Code of Alabama 1940, and the privilege or license tax on mortgages or like instruments is set out under the provisions of Title 51, Section 619, Code of Alabama 1940.

Therefore, as Section 2 herein above quoted only exempts from the privilege or license tax mortgages of whatever kind, I am constrained to

hold that Act No. 181, supra, only has application to mortgages and other instruments which come within the purview of Section 619, supra, and has no application whatsoever to deeds and other instruments treated under the provisions of Section 618, supra.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

August 7, 1947.

Hon. Gordon Persons, President,
Alabama Public Service Commission,
CAPITOL.

Title 48, Sections 16, 337, 338 and 339, Code of Alabama 1940.
Public Utilities—Transfer of Capital Stock.

The Alabama Public Service Commission has authority to require prior approval on the transfer of capital stock of an operating utility in this State, or of a motor carrier as defined in the Alabama Motor Carrier Act of 1939, whenever the Commission deems such action warranted by considerations of public interest.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, under date of May 27, 1947, is as follows:

"The question has arisen as to whether or not this Commission has authority to require prior approval on the transfer of capital stock of an operating utility in this State, or of a motor carrier as defined in the 1939 Act.

"As you know, privately-owned gas, electric, water, and other such companies are usually classed as 'utilities' under the terms of our Act. On the other hand, telephones, telegraph, railroad and other such companies are classed as 'transportation companies.' In addition, there is a 1939 Motor Carrier Act which covers all such carriers.

"The only reference we can find is in Title 48 of the 1940 Code, Section 337. However, it may be that the term 'utilities' is broad enough to cover all three of the groups mentioned above.

"There is no question but what we have authority over the sale of physical assets of either a utility, telephone company or motor

carrier. However, there are certain cases where the control of such a company has changed hands by the sale of all or a majority of their capital stock. It is certainly conceivable that the Commission might issue a certificate of convenience and necessity to one such corporation, after a hearing, when a certificate might not have been issued to another corporation. The question always arises as to the fitness, among other things, of an applicant.

"Cases have come up in the past and probably will arise again in the future, whereby a corporation could hold a monopoly in the State, merely by purchasing the capital stock of competing firms.

"We attach herewith, for such help as it might be, a brief prepared by Mr. H. Sullinger, who was, at the time, Attorney for the City of Bessemer, Alabama.

"We request a formal opinion from you in this matter."

My answer is in the affirmative.

Title 48, Section 337, Code of Alabama 1940, reads as follows:

"§ 337. Sale of property and franchise of utility to purchaser operating like utility.—The property of a utility together with its franchise, contracts, business, good will and other assets, may be lawfully sold and conveyed or leased to, and thereafter lawfully held, enjoyed and operated by, a purchaser then engaged or proposing to engage in the business conducted by such utility; or the capital stock of a corporation owning and operating a utility may be lawfully sold and conveyed to, and thereafter lawfully held and enjoyed by, a purchaser whether or not such purchaser is engaged, or proposes to engage in the business conducted by such utility; whenever such sale and conveyance or lease of the property, franchises, contracts, good will and other assets of such utility, or whenever the sale and conveyance of the capital stock of such corporation, is consistent with the interests of the public."

It can be seen from this section of the Code that express provision is made that sale and conveyance of the capital stock of a utility may be made whenever same is consistent with the interests of the public.

The determination of what constitutes a consistency with the interests of the public in the case of a utility lying within a single municipality and whose franchise and public duties thereof relate to the single municipality is made by the governing body of said municipality and the Public Service Commission as indicated by Title 48, Section 338, Code of Alabama 1940. This Code Section reads as follows:

"§ 338. Sale where utility is in a single municipality.—In cases where the property of the utility proposed to be sold and conveyed or leased lies within, and the franchises and public duties thereof

relate to a single municipality, and in cases where such a utility is owned by a corporation, and its capital stock is proposed to be sold, the question whether the proposed sale and conveyance or lease is consistent with the interests of the public shall be determined by the governing body of such municipality, and also by the public service commission, and if the governing body of such municipality and the commission shall each determine that the proposed sale and conveyance, or lease is consistent with the interests of the public, their determination shall be shown by their approval of the proposed sale and conveyance or lease."

In all other cases the determination of what constitutes a consistency with the interests of the public is made by the Public Service Commission as indicated by Title 48, Section 339, Code of Alabama 1940. This Code Section in turn reads as follows:

"§ 339. Public service commission determines sale; notice of sale.—In all other cases the question whether the proposed sale and conveyance or lease is consistent with the interests of the public shall be determined by the public service commission, and if the commission determines that the proposed sale and conveyance or lease is consistent with the interests of the public, its determination shall be shown by its approval of the proposed sale and conveyance or lease. Thirty days' notice in a newspaper published in each municipality involved of such application, shall be given before the hearing by the commission. If all, or substantially all, of the property and assets of any utility or corporation is proposed to be sold under the provisions of this subdivision, the same procedure shall be necessary as in the case of other private corporations."

From the above statutory authority, it appears clear that prior approval of the transfer of capital stock is vested in the Public Service Commission as related to a "utility."

The question then in issue is the embracing effect of the word "utility."

In Title 48, Section 16, Code of Alabama 1940, you will note that the definition of the words "utility" and "utilities" is set forth as follows:

"Whenever the word 'utility' or 'utilities' is used in this chapter the same shall include all utilities defined under Sections 102, 302, 239 and 270 of this Title."

Section 102 embraces transportation companies; Section 239 embraces motor transportation companies; Section 270 embraces carriers other than motor transportation companies; and similarly Section 302 embraces public utilities other than transportation companies or motor vehicle carriers.

The Legislature having intended the use of the word "utility" or "utilities" as equally applicable to all of the above enumerated classifications in other code sections of the same title, it is my opinion that the same application would apply in an interpretation of sections 337 et sequentia. An affirmative answer is, therefore, given your question by virtue of the wording of Sections 337, 338 and 339, supra.

It is noted that Section 16 referred to was apparently inserted in the Code of Alabama 1940 by the Code Committee for purposes of clarification on just such a point as you specifically raise.

Act No. 628, General Acts 1939, page 995, approved July 2, 1940, is the Act adopting the code of laws for the State of Alabama and Section 2 thereof provides as follows:

"The Code of Alabama as herein adopted shall go into effect and be operative on the thirtieth day after the date of the Governor's Proclamation announcing its publication, and shall govern completely, so far as statutes can, the subjects to which it relates; provided, however, that no statute enacted on or after the twenty-fifth day of June 1940, shall be repealed or affected in any manner by the adoption of this code." (Emphasis supplied)

It is now accepted as settled law in this state that a code is not a mere compilation of laws previously existing, but is a body of laws duly enacted. *State v. Towery*, 143 Ala. 48, 39 So. 309; *Bush v. Greer*, 235 Ala. 56, 177 So. 341.

It is true that Sections 239 and 270 were repealed by the overall legislation of the Alabama Motor Carrier Act of 1939, but to my mind this in no way restricts the intended broad scope of the definition of "utility" and "utilities" as applied in Section 16. It is all too clear that the legislative intent was to make the applicability of the definition referred to inclusive of the enumerated classifications of Section 16.

You are, therefore, advised that it is my opinion that the Alabama Public Service Commission has authority to require prior approval on the transfer of capital stock of an operating utility in this State, or of a motor carrier as defined in the 1939 Act, whenever the Commission deems such action warranted by considerations of public interest.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 7, 1947.

Honorable M. J. Funchess,
Dean and Director,
Alabama Polytechnic Institute,
Auburn, Alabama.

Costs — Condemnation Proceedings — Eminent Domain — Act No. 218, General Acts 1945, p. 340—Title 19, Chapter 1, Sections 5 and 30, Code of Alabama 1940—Act No. 385, General Acts 1943, p. 358.

1. Condemnation proceedings to acquire lands for Alabama Polytechnic Institute under Act No. 218, General Acts 1945, p. 340, are governed by Title 19, Chapter 1, Code of Alabama 1940.

2. Costs of condemnation proceedings under Title 19, Chapter 1, Code of Alabama 1940, must be paid by the applicant (State of Alabama) Title 19, Section 30, Code of Alabama 1940, as amended by Act No. 385, General Acts 1943, p. 358.

3. Costs in condemnation proceedings under Title 19, Chapter 1, Code of Alabama 1940, include compensation awarded to guardian ad litem. Title 19, Section 5, Code of Alabama 1940.

4. Costs in condemnation proceedings under Title 19, Chapter 1, Code of Alabama 1940, include compensation awarded a guardian ad litem incurred after decree of condemnation on issue of what is included in compensation for the lands condemned.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of April 9, 1947, is as follows:

"Attached is a copy of a letter from Mr. Thomas S. Woodroof of Athens, Alabama, setting forth the facts in regard to the purchase through condemnation by the Alabama Polytechnic Institute of a tract of 480 acres of land in Limestone County to be used by the Tennessee Valley Sub-Agricultural Experiment Station to enlarge its research program.

"So far as I am able to understand legal matters, Mr. Woodroof has set forth the matter quite clearly. In next to the last paragraph, he raises pointedly the question that the Alabama Polytechnic Institute would like to have you pass on officially. As the representative of the Alabama Polytechnic Institute in this matter, I ask that you consider the facts set forth in Mr. Woodroof's letter and render us a decision in the matter. Please do not understand that we are

trying to dodge any just claim. However, as a public institution, we wish to have all of our expenditures made in accordance with the laws, rules, and regulations under which we operate.

"Your early attention to this matter will be appreciated."

The letter from Hon. Thomas S. Woodroof, Attorney at Law, Athens, Alabama, which you refer to in your inquiry and which letter sets out the facts, is as follows:

"On the 19th day of January, 1946, the State of Alabama by virtue of an Act of the Legislature of the State of Alabama, No. 218, approved July 7, 1945, which said Act is referred to as House Bill No. 19, filed a petition in the Probate Court of Limestone County Alabama against Irene Grayson, et al, to condemn 480 acres of land, more or less, in Limestone County, Alabama for the use of Alabama Polytechnic Institute, which lands were to be used for the purpose of expanding the operation of the Tennessee Valley Sub-Agricultural Experiment Station, and more specifically for the expansion of experiments dealing with livestock production, breeding, marketing and other similar activities having for their objective the improvement of the livestock program in the area served by the Tennessee Valley Sub-Agricultural Experiment Station.

"The lands condemned were formerly owned by one J. E. Williams, deceased. The said J. E. Williams died before the proceedings were instituted and his will was duly admitted to probate. The portoin of the will of the said J. E. Williams disposing of said lands was as follows: 'I will and devise to my daughter, Irene Grayson, for and during her natural life and on her death to her next of kin and heirs at law, the following described real estate situated in Limestone County, Alabama, to-wit:'

"All parties were duly brought into Court by proper service and the Court entered an order of condemnation and the lands were duly condemned and the amount as fixed by the Commissioners was paid into the Probate Court. When the amount fixed as just compensation was paid into the Probate Court, the Court costs were duly paid through the date that the payment was made into Court. The amount of Court costs paid at the time was \$246.18, which included a guardian ad litem fee of \$150.00.

"The said Irene Grayson filed a petition in the Probate Court to withdraw the funds that were paid into Court for the purpose of reinvesting the funds in certain lands in South Alabama taking the title to the lands in the same manner as provided by the will of the said J. E. Williams as mentioned above. After she filed her petition to withdraw the funds certain Court costs in the sum of \$85.30 have accrued. Included in said sum of \$85.30 is a guardian ad litem fee of \$75.00 for representing and protecting the interest of the minors in the reinvestment of the funds in lands taking the title to same as

set out in said will of the said J. E. Williams. The Probate Court rendered a decree taxing the costs for the reinvestment of the funds against the landowners and then the landowners came in and filed a motion to re-tax the costs and the Court rendered a decree re-taxing the costs against the State of Alabama in the sum of the said \$85.30.

"The question, is: Is the State of Alabama liable for said costs in the sum of \$85.30, which costs accrued after the money was paid into the Probate Court for the lands condemned and which costs came about by virtue of the funds being reinvested in lands taking the title to the lands acquired with said funds in the same manner as the title was in the lands condemned?

"I suggest that you write the Attorney General a request for an official opinion using the facts as set out above."

The facts presented above are further clarified in the following letter, dated May 3, 1947, from Hon. Thomas G. Steele, Attorney at Law, Athens, Alabama, who was the guardian ad litem in this case:

"I have a copy of the letter written by Hon. Thomas S. Woodruff to Dean M. J. Funchess at Auburn, dated April 8, 1947, setting out the basis for requesting a ruling of the Attorney General as to the liability of the State for the cost in the case of State of Alabama vs. Irene Grayson, et al, a condemnation proceeding instituted by the State of Alabama in the Probate Court of Limestone County, Alabama. Here are the facts.

"The petition seeking condemnation was filed in the Probate Court of Limestone County, Alabama, on January 19, 1946, praying condemnation of 480 acres of land for the use of Alabama Polytechnic Institute for the purpose of expanding the operation of the Tennessee Valley Sub-Agricultural Experiment Station.

"The petition correctly sets out that the land descended under the will of J. E. Williams deceased and that under the pertinent provision of the said will, the land passed to Irene Grayson, for and during her natural life and on her death to her next of kin and heirs at law. The petition makes all living next of kin and heirs at law of Irene Grayson, some of whom are minors, parties respondent and due service was had of them.

"By order of the court made on January 19, 1946, the 15th day of February was set as the day for hearing the petition.

"An ordering appointing a Guardian Ad Litem to represent and protect the interest of minors was made on February 15, 1946. The order which was prepared by Attorney for petitioner recites as follows, 'is appointed as guardian ad litem to represent and protect the

interest of the minor defendants, (naming them), on the day set for the hearing of the petition to condemn the lands in this proceedings and on any and all other proceedings in this cause where the interest of said above referred to parties might be involved.'

"The Guardian Ad Litem accepted the appointment on February 15, 1946, in language in part as follows, 'agree to represent and protect the interest of all of the above referred to parties on the day set for the hearing of the petition to condemn the lands sought to be condemned in this proceedings and all other hearings in this proceedings wherein the interest of the above referred to parties might be involved.'

"The Guardian Ad Litem filed answer on February 15, 1946, denying the allegations of the petition and demanding strict proof of the same.

"An Order of Condemnation was entered on February 15, 1946, said order appointing commissioners.

"On February 25, 1946, the State of Alabama, acting by and through Fred Stewart, as Manager of the South Limestone County Experiment Station, entered into a contract with Irene Grayson, the life tenant of the lands, and her tenants agreeing that the compensation to be paid for the land was to be the sum of \$58,000.00. Said contract further contained the provision that, 'The parties who owned the above referred to lands prior to March 5, 1946 shall be entitled to the 1946 rents on the above referred to lands, subject to conditions hereinafter prescribed.' (the conditions are not here material).

"On March 2, 1946, the Guardian Ad Litem filed a claim in the Probate Court setting out the contract that had been entered into and asking the Court to hold that the rent for 1946 be held to be a part of the compensation paid for the land so that the life tenant would only be entitled to a life estate in said rents, the remainder to be protected for remaindermen under the will of J. E. Williams.

"On March 5, 1946, the Oath and Report of Commissioners were filed and a decree entered confirming the report of Commissioners. Over the objection of the Guardian Ad Litem that his representation of the minors was not complete until disposition of the claim he had filed on March 2, 1946 the Court fixed a fee for the Guardian Ad Litem of \$150.00 and taxed the cost accrued up to March 5, 1946, against petitioner. These costs were paid, and a check for \$58,000.00 was paid into Court.

"Irene Grayson was not represented by attorney at this time.

"On April 6, 1946, an order was entered setting April 19, 1946, for hearing the claim filed by the Guardian Ad Litem. On April 19,

1946, Irene Grayson appeared, still without counsel, and the Court holding that the rent for 1946 was a part of the compensation for the land and should be held for the remaindermen, Mrs. Grayson entered into a contract with the Guardian Ad Litem fixing the amount of the rent for 1946 at \$4,000. The Guardian Ad Litem filed a petition praying for confirmation of said contract and by decree entered on April 30, 1946, the Court approved said contract, fixed the life tenants part of the rent at \$320.00, and ordered the remainder of the rent held for the remaindermen under bond. This decree fixed a fee for the Guardian Ad Litem at \$75.00 and was taxed against the proceeds of the land. Counsel for the State was present and knew of this decree.

"On May 25, 1946, Irene Grayson, appearing for the first time by attorney, moved to retax the cost as fixed by the decree of April 30. Notice of this motion was given to counsel for the state by personal service and he appeared. Motion was granted and cost retaxed by decree entered June 21, 1946. No appeal was taken and the costs are unpaid.

"After this decree was rendered, Irene Grayson began a proceeding to reinvest the proceeds of the condemnation proceedings so as to protect the interest of the minors, contingent remaindermen, in a different manner from that ordered by the court at the instance of the Guardian Ad Litem. No part of the cost included in the decree of April 30, 1946, and retaxed by the decree of June 21, 1946, was incurred in and about this reinvestment proceedings. The Guardian Ad Litem appointed as set out above was in no way connected with such reinvestment proceedings. The costs involved in the decree of April 30, 1946, were incurred solely in the proceedings to determine what were the proceeds of the condemnation proceedings, i. e., was the rent for 1946 a part of the proceeds so as to be protected for remaindermen and the incidental proceedings to see that the entire proceeds were protected for remaindermen. To this extent, the recitals of Mr. Woodruff's letter are inaccurate and the question suggested for an opinion of the Attorney General is not responsive to the facts in the case.

"I appreciate your interest in this matter and cannot but feel that the State, being represented at the proceedings to retax the cost and taking no appeal therefrom, should pay the cost."

The apparent conflict in the statement of facts is settled as shown by a letter from Hon. Thomas S. Woodruff, Attorney at Law, Athens, Alabama, dated July 7, 1947. This letter from the attorney who represented Alabama Polytechnic Institute in the condemnation proceedings is also signed by Hon. Thomas G. Steele, the guardian ad litem. This letter states in part as follows:

"I have a copy of Buck Steele's letter to you of May 3, 1947 in regard to the facts in this case. Buck's letter to you correctly states the facts involved in this case.

"In my letter to Dean Funchess, dated April 8, 1947, I was in error when I stated that the \$85.30 costs accrued by virtue of the funds being reinvested in lands taking the title to the lands acquired with said funds in the same manner as the title was in the lands condemned. This cost that is in question did accrue after the money was paid into Court for the lands, but the costs came about by virtue of a squabble between the life tenant and the guardian ad litem as to what portion of the funds and the rents contained in the contract between the State and the life tenant was 'compensation for the land' and the further proposition of securing the amount held to be 'compensation paid for the lands' for the remaindermen.

"Buck is present at the writing of this letter and will sign same so that you may know that there is no disagreement as to actual facts.

Very truly yours,

Thos S. Woodroof

Thomas G. Steele."

You are advised that when condemnation proceedings are brought in the name of the State of Alabama to acquire lands for the Alabama Polytechnic Institute under the provisions of Section 7 of Act No. 218, General Acts 1945, p. 340, approved July 7, 1945, such proceedings are governed by Title 19, Chapter 1, Code of Alabama 1940. This chapter provides, in Section 30 thereof, as amended by Act No. 385, General Acts 1943, p. 358, that the costs of the condemnation proceedings shall be paid by the applicant. In the case outlined in your inquiry, the State of Alabama (Alabama Polytechnic Institute) was the applicant in the condemnation proceedings and under Section 30, as amended, *supra*, the costs should be properly taxed against the State of Alabama. By virtue of Title 19, Section 5, Code of Alabama 1940, the costs so assessed should include the compensation awarded to a guardian ad litem.

The costs of the condemnation proceedings, therefore, should be paid by the State of Alabama out of the funds of the Alabama Polytechnic Institute. See Act No. 218, General Acts 1945, p. 340, Section 7. In fact, the above cited Section 7 requires the Alabama Polytechnic Institute to make bond to pay all costs of such condemnation proceedings.

From the facts stated in the above quoted letters, it appears to me that the costs of \$85.30, including a fee for the guardian ad litem of \$75.00, accrued because of a petition filed by the guardian ad litem on March 2, 1946, asking that the court hold that the rent for 1946 be

considered part of the compensation paid for the land. It further appears that on April 19, 1946, the probate court held that the rent for 1946 was a part of the compensation for the land.

It is my opinion that even though this ruling of the court occurred after the decree of condemnation on March 5, 1946, and after the \$58,-000.00 was paid into court, such ruling and such proceedings involved a determination of what should be included in the compensation to the owners of the land, and was therefore part of the condemnation proceedings. Such costs should, therefore, be taxed against the applicant. Title 19, Section 5, Code of Alabama 1940; Title 19, Section 30, Code of Alabama 1940, as amended by Act No. 385, General Acts 1943, p. 358.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

August 11, 1947.

Hon. John Graves,
State Comptroller,
Department of Finance,
Montgomery 4, Alabama.

Department of Public Welfare—Counties—Sales Tax Distribution—Title 51, Section 784, Code of Alabama 1940, as amended by Act No. 82, General Acts 1943, p. 86.

A county having appropriated during any fiscal year an amount for public welfare purposes which is equal to or greater than the amount which said county appropriated for public welfare purposes during the fiscal year 1942-1943 is entitled to its proportionate share of sales tax earmarked for old age assistance under the provisions of Title 51, Section 784, Code of Alabama 1940, as amended by Act No. 82, General Acts 1943, p. 86.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an opinion encloses a letter dated July 23, 1947, from F. M. Mitchell, Director of the Bureau of Accounts of the Department of Public Welfare. This letter sets out the facts as follows:

"We have been advised that the appropriating authorities in Jackson County have refused to make further appropriations to the Jackson County Welfare Department during this fiscal year.

"As you will recall the 1943 Legislature amended Title 51, Section 784 of the 1940 Code of Alabama distributing \$650,000 from the sales tax funds to the counties earmarked for Old Age Assistance, the

provision being that the counties must make available to the welfare departments at least the same amount of money appropriated during the fiscal year 1942-1943 in order to qualify for this sales tax fund earmarked for Old Age Assistance.

"During this fiscal year Jackson County has appropriated to the Jackson County Welfare Department the following sums:

"October, 1946	\$ 1,400.00
November, 1946	1,400.00
December, 1946	1,400.00
January, 1947	3,666.60
February, 1947	1,400.00
March, 1947	1,400.00
April, 1947	1,400.00
May, 1947	1,400.00
June, 1947	1,400.00
Total	\$14,866.60

"The 1942-1943 basis as established in connection with the amendment of Title 51, Section 784, for Jackson County is \$14,000; therefore, you will see that Jackson County has appropriated to the Jackson County Welfare Department an amount in excess of the requirements, and in my opinion this qualifies Jackson County to receive all of the sales tax funds earmarked for Old Age Assistance for this county during this fiscal year.

"You have received certifications from the Jackson County Welfare Department in the amounts as listed above, and due to the fact that Jackson County has qualified for the fiscal year's amount of funds from sales tax earmarked for Old Age Assistance, I am respectfully requesting that they be included in the distribution for the remaining months of this fiscal year, same being July, August, and September, 1947."

In my judgment, Jackson County having appropriated during the fiscal year 1946-1947 for public welfare purposes an amount equal to or greater than appropriations for public welfare purposes for the fiscal year 1942-1943, such county is entitled to its proportionate share of excess sales tax collections earmarked for old age assistance. That part of Act No. 82, General Acts 1943, p. 86, approved July 2, 1943, and effective October 1, 1943, to which your inquiry relates, is as follows:

"If the amount of such collections in any fiscal year, remaining after the payment of the expenses of administration and replacement of the amounts in the several funds as herein provided and distributed to the sixty-seven counties as herein provided, is greater than four million, two hundred thousand dollars, then an amount equal to one-fourth of such excess shall be divided and distributed among the sixty-seven counties of the State according to the population

sixty-five years and over in age as shown by the last Federal census; provided, however, that this one-fourth of such excess shall not exceed the sum of six hundred, fifty thousand dollars per annum, and provided further that this sum shall be expended by the counties for old age assistance exclusively and in addition to their present expenditures for public welfare purposes. The amount of the proceeds of all taxes levied by this article remaining after the payment of the expenses of administration and enforcement and the replacement in the several funds of the amount lost by any homestead exemptions and the distribution to the sixty-seven counties as herein provided shall be paid into the Alabama Special Educational Trust Fund."

In an opinion of the Attorney General rendered October 14, 1943, Quarterly Report of Attorney General, Vol. 33, p. 33, it was held that in order for counties to become entitled to the excess sales tax distribution, under the provisions of the above quoted Act, it was necessary for such county to maintain its appropriation for public welfare purposes in an amount equal to or greater than the amount appropriated for public welfare purposes for the fiscal year 1942-1943. It was further stated in that opinion that since the excess sales tax as provided for in the above quoted Act was distributed, as a matter of practice, on a monthly basis, a county would be entitled to its proportionate share of such excess if the county appropriated each month an amount equal to or greater than one-twelfth of its appropriation for public welfare purposes for the fiscal year 1942-1943.

From the facts stated in the enclosed letter from the Department of Public Welfare, it appears that Jackson County, for the fiscal year 1946-1947, has already appropriated for public welfare purposes an amount which is greater than its 1942-1943 appropriation for public welfare purposes. In my judgment, therefore, Jackson County has met the requirements of the above quoted Act, and is, therefore, entitled to its proportionate share of the excess sales tax which is earmarked for old age assistance.

Although the county may make its appropriation as a matter of practice on a monthly basis for public welfare purposes, when the combined monthly appropriations for public welfare purposes for a fiscal year reaches the point where it is equal to or greater than such appropriation for 1942-1943, under the terms of the foregoing Act that county then becomes entitled to its part of the excess sales tax earmarked for old age assistance.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

August 12, 1947.

Hon. Wayland Mills,
Chief Clerk,
Escambia County,
Brewton, Alabama.

Mortgage Filing Tax—Banks—National Banks—Title 51, Section 619, Code of Alabama 1940.

1. Where a mortgage is filed for record executed to a State bank and a National bank as joint mortgagees, the amount of mortgage filing tax is to be determined by the amount of money loaned by each institution.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 11, 1947, is as follows:

"In line with our telephone conversation this morning I am enclosing herewith a mortgage from W. J. Bartel and wife, Aimes A. Bartel, to The Bank of Atmore and The Merchants National Bank of Mobile.

"I will appreciate it very much if you will please inspect this instrument and advise us what amount of mortgage tax to collect.

"Your prompt attention to this matter will be greatly appreciated."

In answer to your request you are advised, that in my opinion, the instrument executed by W. J. Bartel and wife to The Bank of Atmore and The Merchants National Bank of Mobile as joint mortgagees is subject to mortgage filing tax on the sum of \$15,000.00.

The principal sum secured by the instrument in question is \$20,000.00. I am advised in a subsequent letter from you that of this principal amount The Merchants National Bank of Mobile loaned the sum of \$5,000.00 and the balance of \$15,000.00 was loaned by The Bank of Atmore.

As you are aware, the mortgage filing tax is imposed by Title 51, Section 619, Code of Alabama 1940.

In the case of *Federal Land Bank vs. Crosland*, 261, U. S. 347 43, S. Ct. 385, 67 L. Ed. 703, the Supreme Court of the United States held that Federal instrumentalities were not subject to the mortgage filing tax imposed by this section. Therefore, since The Merchants National Bank of Mobile is an instrument of the Federal Government, it is not subject to the State mortgage filing tax.

The tax imposed by Section 619, supra, is measured by the amount of indebtedness secured by the mortgage and not by the value of the property conveyed thereby. Since the amount of the indebtedness secured to The Merchants National Bank of Mobile is only \$5,000.00, which is exempt from the tax here in question, this leaves a balance of \$15,000.00 subject to the tax imposed by Section 619, supra. At the time this instrument was offered for record State banks were not exempted from the payment of the mortgage filing tax. Therefore, The Bank of Atmore, being a State bank, is subject to the mortgage filing tax on the amount of money actually loaned by it; i. e. \$15,000.00.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

August 12, 1947.

Hon. Haygood Paterson,

Commissioner,

Department of Agriculture & Industries,

CAPITOL.

AGRICULTURE

COOPERATIVE AGRICULTURAL ASSOCIATIONS—Chapter 1, Article 9, Title 2, Sections 69-133, Code of Alabama 1940.

1. Chapter 1, Article 9, Title 2, Sections 69-133 of the Code of Alabama is a codification of all the statutes of this State authorizing cooperative associations, whether incorporated or not, to engage in the business of marketing agricultural products.

2. The said code provisions are to be executed under the general supervision and control of the Commissioner of Agriculture and Industries.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of May 23, 1947, is as follows:

"I respectfully request an opinion from you as to whether Co-operative Associations organized under Subdivision 3, of Title 2,

Sections 115 through 133 inclusive, of the Code of 1940 are to be considered as requiring the regulatory powers of the Commissioner under Subdivision 1, of Article 9, Sections 69 through 84 inclusive, as are those Co-Operatives organized under Subdivision 2 of the same Title, Sections 85 through 114 inclusive."

Your request for an opinion is based upon Chapter 1, Article 9, Title 2, Sections 69-133, of the Code of Alabama.

The evident intent of the legislature was to codify all existing laws on the subject of cooperative agricultural marketing associations and all other organizations which have for their objects engaging in activities similar to those of existing marketing associations and to arrange them systematically into Chapter 1, above designated, and further to harmonize, supply omissions, and to generally clarify and make complete a body of laws designed to regulate completely subjects to which they relate even to the extent of adding new provisions to meet present day needs on the subject. *Gibson v. State*, 214 Ala. 38, 106 So. 231; 50 American Jurisprudence (Statutes) Section 40.

It is proper and helpful to ascertain the history of cooperative agricultural associations and just what the law was at the time of the adoption of the Code of Alabama 1940.

Chapter 274 of the Code of 1923 of Alabama treats the subject of corporations of every type then extant. This chapter is divided into twenty-six articles, addressed to separate kinds of corporations. Article 20, Sections 7127-7155, treats cooperative marketing associations and Article 21, Sections 7156-7161 provides for mutual farming or trucking associations. Article 20 is the progenitor of Subdivision 2 of our Code of 1940. Each section, except Section 114, carries in parenthesis the corresponding sections of the Code of 1923. Section 114, just referred to, purports to be based on the Acts of 1935, page 611. This is Act No. 221 of an Act entitled "To Provide for Dissolution of Cooperative Marketing Corporations or of Cooperative Marketing and Purchasing Corporations or Associations."

In bringing this independent statute into Section 114 of the Code of 1940 many changes were made.

Article 21 of the Code of 1923 provides a basis for Subdivision 3, Article 9, of our present Code. This Article 21 is expressly repealed by Act No. 220, Acts 1935, page 604. This statute provides for the incorporation, organization and regulation of "Mutual Cooperative Marketing and Purchasing Corporations or Associations of Agricultural Products." It deals with the subject at great length and contains twenty sections. Some of its provisions are incorporated in Subdivisions 1 and 2 of Article 9, of the 1940 Code, above noted. Section 15 of the Act carries the provision "Any corporation or association organized hereunder shall pay to the State the annual permit fee of \$10.00 now required by law." Neither Articles 20 nor 21 of the 1923 Code make any provision for permit fees. Chapter 20 of the 1923 Code shows that it is based upon Acts 1921, page 23. It was adopted October 29, 1921, at a special session of the legislature. This Act makes no provision for a permit fee. Act No. 163, General Acts of Alabama for 1927, page 139, enacted a general law to further provide for the "general revenue of the State of Alabama." In Section 43 of the Act, pages 172-173, it is provided that permit fees ranging from \$10.00 to

\$100.00 must be paid to the Secretary of State, the amount of the permit fee depending upon the capital stock of the corporation.

This Section 43 of the 1927 Act was amended by Act No. 54, General Acts 1931, pages 68-70, by requiring that domestic corporations procure from the Tax Commissioner an annual permit fee for which they should pay a fee of \$10.00. This statute was brought into the 1940 Code as Title 51, Section 346.

It must be noted that this statute was approved after the Agricultural Code of Alabama, which Code is cited as the law on which Subdivisions 1 and 2, Article 9, now on review, is based. It is important to note that this Article 9 of the present Code removes this entire subject from Chapter 274 of the Code of 1923 where it was treated under the head of "Corporations" and places the subject under the general title "Agriculture." It now places the subject under the supervision of the Commissioner of Agriculture and Industries.

When this Article 9 is read in the light of the various statutes cited above, it becomes manifest that the purpose of the legislature was to use the various statutes as a basis for this Article 9 and, in doing so, some provisions of the statutes were used, some rejected, and others modified and enlarged, the effect of which is to write a new statute on the entire subject. This theory is further supported by Section 69, Subdivision 1, of Article 9, where it is provided "The word 'association' as used in this subdivision shall refer to cooperative marketing associations and other organizations, whether incorporated or not, which have for their objects engaging in activities similar to those of cooperative marketing associations." Subdivision 1 of the present Code creates no association nor does it vest them with any powers but it is merely prescribing provisions addressed to associations organized under Subdivisions 2 and 3 or any other similar activities.

It is a cardinal principle of law that the Code of Alabama is not a mere compilation of the laws previously existing but is a body of laws duly enacted so that laws which previously existed ceased to be law when omitted from the Code and additions which appear therein become the law from the date of the approval adopting the Code. *State v. Lowery et al*, 143 Ala. 48, 49, 39 So. 309. It is also a principle of law that if a code is enacted as a whole at the same time, the fact that one section is printed subsequent to another is no indication that the legislature intended that the latter section shall prevail. 2 *Southerland Statutory Construction*, 3rd ed., Section 3711.

In view of the above conclusions, it is my opinion that your inquiry should be answered in the affirmative.

Respectfully,

A. A. CARMICHAEL,
Attorney General.

August 12, 1947.

Hon. J. V. Chambers,
Judge of Probate,
Chambers County,
LaFayette, Alabama.

Counties—Courts of County Commissioners—Warrants—Temporary loans—Title 12, Sections 85, 124, and 125, Code of Alabama 1940.

1. Under the provisions of Title 12, Sections 124 and 125, Code of Alabama 1940, a county has authority to make a temporary loan or loans in anticipation of the collection of taxes for the benefit of the general fund and road and bridge fund only.

2. The term "one-half of the income of said county for the preceding year," as used in Section 125, *supra*, means one-half of the income of the county for the preceding year from all sources.

3. Under the "Financial Control Act" (Title 12, Sections 73-91, Code of Alabama 1940), the governing body of a county may not legally issue a warrant against the general fund or the road and bridge fund of the county and repay the same over a period of twenty years by making an annual payment of 5 per cent of the principal and accumulated interest.

4. When a temporary loan is made by the governing body of a county as provided in Title 12, Sections 124 and 125, Code of Alabama 1940, the judge of probate of the county, when duly authorized by the county governing body, may legally issue a check against the general fund or road and bridge fund of the county in payment of such temporary loan and the amount of accrued interest due thereon.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of April 11, 1947, is as follows:

"I would appreciate at your earliest convenience an official opinion on the questions raised below:

"The Court of County Commissioners of Chambers County, Alabama, on May 15, 1945, issued an Interest Bearing Warrant payable out of the General Fund of the County in the amount of \$50,000 with interest at 2% due in one year. This warrant was renewed for one year on January 15, 1946, the County paying the interest due at 5%

or \$2500.00 of the principal. This warrant was again renewed for one year on January 15, 1947, the County paying the interest then due and 5% or \$2375.00 of the principal. There is now outstanding a principal indebtedness of \$45,125.00 and interest. This indebtedness was created in 1945 and the budget under which this County operates makes no provision for the payment of the same nor of any interest thereon.

"In connection with this situation, I would like to present the following questions:

"1. Is the Court of County Commissioners authorized under the present Financial Control Act to issue such a warrant against the general fund and repay the same over a period of twenty years by making an annual payment of 5% of the principal and the accumulated interest?

"2. Would the Probate Judge of Chambers County, as Chairman of the Court of County Commissioners, be liable on his official bond for issuing checks against the General Fund in payment of the principal of this loan?

"3. Would the Probate Judge of Chambers County, as Chairman of the Court of County Commissioners, be liable on his official bond for issuing checks against the General Fund in payment on interest on this loan?

"In addition to the above situation, the Court of County Commissioners of Chambers County issued on October 11, 1944 an Interest Bearing Warrant against the 2½ Mill Road and Bridge Fund in the amount of \$25,000.00 with interest at 2% due in one year. This warrant was renewed on October 11, 1945 for one year, the County paying the interest then due and 5% or \$1250.00 of the principal. This warrant was again renewed on October 11, 1946 for one year, the County paying the interest then due and 5% or \$1187.50 on the principal. There is now an outstanding indebtedness on this loan of \$22,562.50 and interest. This indebtedness was created in 1944 and the budget under which this County operates makes no provision for the payment of the same nor of any interest thereon.

"In connection with this situation, I would like to present the following questions:

"1. Is the Court of County Commissioners authorized under the present Financial Control Act to issue such a warrant against the 2½ Mill Road and Bridge Fund and repay the same over a period of twenty years by making an annual payment of 5% of the principal and the accumulated interest?

"2. Would the Probate Judge of Chambers County, as Chairman of the Court of County Commissioners, be liable on his official bond for issuing checks against the 2½ Mill Road and Bridge Fund in payment of the principal of this loan?"

"3. Would the Probate Judge of Chambers County, as Chairman of the Court of County Commissioners, be liable on his official bond for issuing checks against the 2½ Mill Road and Bridge Fund in payment of interest on this loan?"

In addition to the facts set out in your request under date of April 11, 1947, the following information was contained in your letter of May 1, 1947:

"The authority for issuing the interest bearing warrant against the general fund is set forth in the minutes of the regular meeting of the Court of County Commissioners at the regular meeting of the Court held November 13, 1944, Minute Book 12, Page 492, and is as follows:

"AUTHORITY FOR LOAN FOR ACCOUNT OF GENERAL FUNDS

"Upon motion of J. P. Hill, duly seconded by H. B. Walton, the Court voted authority to the Judge of Probate to borrow \$50,000.00 for the General Fund Account.'

"The renewal of this loan was authorized at a regular meeting of Commissioners' Court held January 14, 1946, and recorded in Minute Book 13, Page 31, and said authority is as follows:

"WARRANT No. 26—\$47,500.00

"Upon motion made and duly seconded, the Court voted to issue Warrant No. 26 dated January 15, 1946, to mature January 15, 1947, for \$47,500.00 to bear interest at 2%, the proceeds from which to be used to help pay Warrant No. 24 for \$50,000.00 plus interest maturing January 15, 1946.'

"The renewal of this loan was again authorized at a regular meeting of Commissioners' Court held January 13, 1947, and is set forth in Minute Book 13, Page 158, as follows:

"WARRANT #26 ON GENERAL FUND DUE

"Judge of Probate stated to Court that Warrant #26 on General Fund for \$47,500.00 was due. On motion of J. B. Wheeler, seconded by J. P. Hill, Court voted to reduce 5% and pay interest. Same was renewed for period of 1 year.'

* * * * *

"The income of the general fund for the year ending September 30, 1945, was \$165,309.62, of which the funds borrowed constituted \$50,000.00 and the normal revenue amounted to \$115,309.62. * * * * *

* * * * *

"Previous audits made by the office of the State Examiner of Accounts refer to this loan as a temporary loan.

* * * * *

"In connection with the interest bearing warrant issued against the road and bridge fund, the issuance of said warrant was authorized at the regular meeting of the Commissioners' Court held October 9, 1944, and said authority appears in Minute Book 12, Page 483, as follows:

" 'COSTS OF BLACKTOP ROAD

"Judge Grady stated that the bills for the Prime for the Farm to Market Roads were coming in; also that the County would have to pay the Construction Company when the blacktopping was finished. Upon motion of J. P. Hill, seconded by H. B. Walton the Court voted instructions to Judge of Probate to execute a warrant for \$25,000.00 at best rate of interest obtainable, the proceeds to be used for above purposes.'

"The renewal of this loan was authorized at a regular meeting of the Commissioners' Court held October 8, 1945, and said authority is set forth in Minute Book 13, Page 1, as follows:

" 'MATURITY OF WARRANT No. 23 at FARMERS & MERCHANTS BANK.

"Judge of Probate stated to the Court that Warrant No. 23 for \$25,000.00 to Farmers & Merchants Bank would mature on October 11, 1945, and upon motion made and duly seconded the Court voted to pay 5% of principal and the interest due and execute a new warrant for the remainder.'

"The next renewal of this loan was authorized at a regular meeting of the Commissioners' Court held October 14, 1946, and said authority appears in Minute Book 13, Page 107, as follows:

" 'WARRANT DUE

"Judge stated to Court that Road and Bridge Fund Warrant was due on October 11, 1946. On motion of J. P. Hill, seconded by H. B. Walton, warrant be reduced five per cent and refund for 1 year with warrant 282. Voting for J. B. Wheeler, J. P. Hill and H. B. Walton. Voting against E. A. Hawkins.'

* * * * *

"The road and bridge fund had a total income for the year ending September 30, 1945 of \$151,167.48, which was composed of revenue in the amount of \$44,467.48, cash from the loan of \$25,000.00, and funds transferred from other county funds \$81,700.00. No funds were transferred out of the road and bridge fund during that year.

"Previous audits by the office of State Examiner of Accounts refer to this item as a temporary loan.

* * * * *

In answer to your inquiries, your attention is called to Title 12, Sections 85, 124 and 125, Code of Alabama 1940, which are as follows:

"§ 85. Temporary loans.—In making up the budget provided for under this chapter the amount borrowed on temporary loans in anticipation of the collection of taxes to be made during each fiscal year shall be included as a part of the operating revenue of the county for such year; and the amount of such temporary loan, principal and interest, payable in each fiscal year, shall constitute a part of the current operating expenses to be included in the budget of the county for the fiscal year in which such loans are payable, and shall be paid out of the funds pledged therefor."

"§124. Counties may make loans in anticipation of taxes.—Courts of county commissioners, boards of revenue, or other governing bodies of the counties of this state, for and in behalf of their respective counties, may make temporary loans in anticipation of the collection of taxes for the year in which such loans are made, and may issue certificates covering such loans, and may pledge a sufficient amount of uncollected taxes of the current year to secure the repayment of such loan or loans."

"§ 125. Amount of loans, interest, maturity.—Such loans shall not be for a sum greater than one-half of the income of said county for the preceding year, and all such loans may bear interest not exceeding six percent per annum, and may be renewed from time to time upon the payment of interest, provided that no loan, original or renewal, shall mature later than February first of the year following, and provided further, that, after the adoption of this Code the borrowing limit herein provided shall be reduced five percent each year for the next succeeding twenty years; no proceeds from any loan made under the provisions of this chapter shall be used for any purpose other than that for which general funds may now be used."

Title 12, Section 125, Code of Alabama 1940, was under consideration in an opinion in Quarterly Report of Attorney General, Vol. 24, p. 219. In this opinion it was said:

"As I construe said section, it means this: After May 31, 1941, and during the fiscal year 1940-41, a county may make such a tem-

porary loan for a sum not greater than one-half (50%) of the income of said county for the fiscal year 1939-40, and without regard to whether or not it made a temporary loan for the fiscal year 1939-40, or the amount of such loan, if one was made. One-half, or 50%, of the income for the preceding year is the borrowing limit on a temporary loan for the fiscal year 1940-41. In each succeeding fiscal year, this borrowing limit is reduced by 5%, but without regard to the actual amount of the temporary loan, if any, made during the preceding fiscal year. Of course, this means 5% of the original borrowing limit of 50% of the income for the preceding year which, in practical operation, means 2½% of the total income for the preceding year. For your guidance, I here set out a table showing the borrowing limit on temporary loans under Section 125, supra:

* * * * *

"1944-45—40% of the income for the fiscal year 1943-44.

* * * * *

"After the fiscal year 1959-60, no temporary loan may be made, if Section 125, supra, is still the applicable law."

From the information contained in your request and your letter of May 1, it is my conclusion that both of the "warrants" under consideration are temporary loans made under the authority of Title 12, Sections 124 and 125, supra. Both of these "warrants" were made payable in one year. Title 12, Section 85, supra.

The appellate courts of Alabama have not passed upon the question of what constitutes the income of the county within the meaning of the term as used in Section 125, supra. However, in a petition for a declaratory judgment by Chris J. Sherlock, as Highway Director of the State of Alabama v. Bullock County, et al, in the Circuit Court of Montgomery County, the court had under consideration, among other questions, the question of what constituted the income of the county within the meaning of the temporary loan statutes (Title 12, Sections 124-128, Code of Alabama 1940). In the decree of the court in this case the court held:

"That the Court of County Commissioners of Bullock County has the authority to make such a temporary loan or loans in anticipation of the collection of ad valorem taxes for the benefit of the general fund and the road and bridge fund only.

"That the maximum amount of such a temporary loan or loans is a sum not greater than one-half of the income of said county for the preceding year from all sources."

On appeal to the Supreme Court (*Bullock County v. Sherlock*, 242 Ala. 262, 5 So. (2d) 800), the question of what constituted the income

of the county within the meaning of the temporary loan statutes was not passed upon by the court.

Both the temporary loans under consideration, totaling \$75,000.00, were made during the fiscal year commencing October 1, 1944, and ending September 30, 1945. The borrowing limit on temporary loans made by a county during the fiscal year 1944-45 was 40 per cent of the income of the county from all sources for the fiscal year 1943-44.

The records in the office of the Chief Examiner of Accounts show that the income of the general fund and the road and bridge fund of Chambers County for the fiscal year 1943-44 was \$138,089.67, and that the total income of the county from all sources for the same fiscal year was \$280,546.07.

It therefore follows that the borrowing limit of Chamber County on temporary loans for the fiscal year 1944-45 was 40 per cent of \$280,546.07, or \$112,218.43.

It will thus be seen that the temporary loans in the amount of \$75,000.00 made by Chambers County during the fiscal year 1944-45 were well within the borrowing limit of temporary loans prescribed in Section 125, *supra*.

Answering your first inquiry in reference to the "Interest Bearing Warrant payable out of the General Fund of the county in the amount of \$50,000 with interest at 2% due in one year," it is my opinion that under the "Financial Control Act" (Title 12, Sections 73-91, Code of Alabama 1940), the Court of County Commissioners may not legally issue "a warrant against the General Fund of the County and repay the same over a period of twenty years by making an annual payment of 5% of the principal and the accumulated interest." Biennial Report of Attorney General, 1936-38, page 590. However, as stated above, this was not a "warrant" issued under the "Financial Control Act" but was a temporary loan made in accordance with the provisions of Title 12, Sections 124 and 125, Code of Alabama 1940.

In answer to your second inquiry in this connection, it is my opinion that you may legally issue a check against the General Fund of the County upon proper authority of the Court of County Commissioners in payment of the temporary loan in the amount of \$45,125.00, which loan is evidenced by a warrant issued against the General Fund of the County as authorized by the Court of County Commissioners and payable within one year. The fact that the evidence of such indebtedness is in the form of a warrant is not material.

Answering your third inquiry, in view of the conclusions reached in answering your second inquiry, it is my opinion that upon proper authority of the Court of County Commissioners, you may legally issue a check

against the General Fund of the County in payment of the interest on the temporary loan under consideration.

The situation presented by your three inquiries in reference to the "Interest Bearing Warrant against the 2½ Mill Road and Bridge Fund in the amount of \$25,000.00 with interest at 2% due in one year," is identical to the situation presented by your three inquiries in reference to the "Interest Bearing Warrant payable out of the General Fund of the County in the amount of \$50,000 with interest at 2% due in one year." Therefore, your last three inquiries are answered by the reasons advanced, and conclusions reached, in answering your first three inquiries.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1947.

Hon. A. R. Meadows,
Superintendent of Education,
Department of Education,
CAPITOL.

Schools—Minimum Entrance Age—Act No. 234, General Acts 1947—Title 52, Section 298, Code of Alabama 1940.

Act No. 234, General Acts 1947, is so ambiguous, vague, indefinite, incomplete, and unintelligible as to be inoperative and void for uncertainty in meaning.

Title 52, Section 298, Code of Alabama 1940, governs the age at which children may enter public school.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of August 11, 1947, is as follows:

"RE: ACT NO. 234.

"Act 234 became a law under Section 125 of the Constitution. The purpose of this act is to amend Section 298 of the 1940 Code of Alabama, which related to the minimum age at which children may enter public schools. A question has been raised as to the year to which the act applies. For example, would a child who is six years of age on or before January 15, 1948 be entitled to admission to public elementary schools at the opening of such schools in the beginning of the school term in the fall of 1947, or in the fall of 1948, or is the Act so ambiguous that it cannot be interpreted with certainty

for either year? If the latter is the case, would Section 298 of Title 52 Code of 1940 prevail? Your opinion as to the interpretation of this act at an early date will be appreciated."

Act No. 234, referred to in your inquiry, is as follows:

"AN ACT

"(No. 234)

"To amend Section 298 of Title 52 of the 1940 Code, which relates to the minimum age at which children may enter public school.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 298 of Title 52 of the 1940 Code is amended to read: 'A child who is six years of age on or before January 15th shall be entitled to admission to the public elementary schools at the opening of such schools for that school year or within the first two weeks of school; a child who is under six years of age on January 15th shall not be entitled to admission to such schools during that school year, except that a child who becomes six years of age on or before June first may, on approval of the board of education in authority, be admitted at the beginning of the second semester of that school year to schools in school systems having semiannual promotions of pupils.'

"This Act became a law under Section 125 of the Constitution."

Two questions are posed in your inquiry, and I shall dispose of them in the order in which they appear.

This Act cannot be read without confusing the legal mind. As a matter of fact, this Act cannot be commended in any respect, except for its brevity. However, its brevity contributes to the confusion. In short, it is a conglomeration of words.

There are several cardinal rules of construction that must be employed in seeking to construe an Act that is ambiguous, vague, indefinite, uncertain, and unintelligible. If the legislative intent cannot be ascertained from the words used, then the Act cannot be removed from the category of ambiguity, vagueness, indefiniteness, uncertainty, and unintelligibility. Judicial ipse dixit should never be allowed to supply defects in a statute to make an Act sound and workable. To do so would be an encroachment by the judiciary upon the legislative department of the government.

The office of interpretation of a statute is not to improve the statute, but is to expound it, and the court determines the intention of the statute only from the words in which intention is expressed, applied to the existing facts. *Gibbs v. State*, 29 Ala. App. 113, 192 So. 514.

The primary purpose here is to ascertain the intention of the Legislature. There are several cardinal rules of statutory construction, long sanctioned by the courts, that may be called into life in seeking legislative intent. I will state some of them:

The fundamental rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute, if it is unambiguous. *Dixie Coaches v. Ramsden*, 238 Ala. 285, 190 So. 92.

When possible, a statute should be rationally interpreted to carry out the legislative intent. *Gulf States Steel Co. v. U. S.*, 287 U. S. 32, 53 S. Ct. 69, 77 L. Ed. 150.

The legislative intent must be gathered from the plain meaning of the words used in the statute. *Durr Drug Co. v. U. S.*, 99 Fed. 2d. 757, 119 A. L. R. 1192.

Where the meaning and intent are not obvious the court must attempt to arrive at the legislative intent. *Henry v. McCormack Bros. Motor Car Co.*, 232 Ala. 196, 167 So. 256.

The courts can only learn what the Legislature intended by what it has said, and have no right to stray into mazes of conjecture or search for an imaginary purpose, in construing a statute. *Holt v. Long*, 234 Ala. 369, 174 So. 759.

Statutes should be construed according to the manifest purpose and intention of the lawmakers, and such purpose should not be defeated by a narrow construction based on nice distinctions in the manner of words. *Ex parte State, ex rei Lawson*, 241 Ala. 304, 2 So. 2d. 765.

The intention of the Legislature in enacting a law is the law itself, and must be enforced when ascertained though it may not be consistent with the strict letter of the law. *Cole v. Gullat*, 241 Ala. 669, 4 So. 2d. 412.

The court may not look for legislative intention in anything but the legislative language, and although that language may be explained, it cannot be distracted from or added to. *Williams v. State*, 28 Ala. App. 73, 179 So. 915.

Where the language of a statute is not clear, the legislative intent will be sought from the whole subject, and, in giving effect to legislative intent, courts may look to the context of the statute and its provisions and to the history of the statute, conditions which led to its enactment, material surrounding circumstances, ends to be accomplished, and evils to be avoided or corrected. *Board of Education of Jefferson Co. v. State*, 239 Ala. 276, 194 So. 881.

With these rules in mind, and many others, I revert to the Act in question, and confess that I am no closer to a solution in ascertaining the legislative intent.

It would be relatively easy to suggest words to clarify this Act and make it sensible, but the rules governing statutory construction prevent this. It would be relatively easy to read into the Act dates and terms to clear up the confusion, but again the rules by which I am governed conclude and stay my hand. The state in which I find myself at this point furnishes the proof that the Act is ambiguous in the extreme. The Act says, "A child who is six years of age on or before January 15th shall be entitled to admission to the public elementary schools at the opening of such schools for that school year or within the first two weeks of school, * * *." The word "is" is a verb denoting the present tense. Therefore, a child must be six years of age before he can be admitted to the public elementary schools at the opening of such schools. "For that school year," leaves me to speculate and surmise as to what year reference is made. I do not know whether it is 1947 or 1948. The Act does not say, and, again I cannot legislate. A "school year" is synonymous with a "school term." A "school year" has a recognized meaning in educational circles, and generally, and means that schools are open for thirty-six weeks or nine months. But, there is a "school year" or "school term" in 1947 and 1948, and every year thereafter. The lawmakers did not say, I cannot say, what school year or what school term was meant in this Act.

It is the public policy of this State that children be compelled to go to school between the ages of seven and sixteen. Title 52, Section 297, Code of Alabama 1940. It is the public policy of this State that they be not required to go to school under seven years of age. The acknowledged educational history of the State proves this.

What brought this Act into life? Did the Legislature intend to lower the entrance age of children into our school system? Did they intend to raise the entrance age of children into our school system? The Legislature did not say. The title of the Act only says that it is an Act to amend Section 298 of Title 52 of the 1940 Code, which relates to the minimum age at which children may enter public school. Does the Act fix the minimum age at five and a half to six years, or six to six and a half years? Again, the Act did not say. It may be that the lawmakers felt that the entrance age should be raised in view of the times. We all know that the conditions in our public schools today are overcrowded; that the school facilities are limited; that the coffers for educational purposes are low, that the school teachers are rapidly leaving their profession and seeking employment elsewhere; that an amendment is now pending before the people of Alabama designed to turn millions of dollars into the coffers for educational purposes; that talk is prevalent, rumors abound, that teachers will not sign contracts for the next school year.

What did the Legislature mean by this Act? The intention cannot be ascertained from the four corners of the Act. The historical background, the expediency of the times, the prior public policy of the State, while they serve to fire the imagination, render little aid toward a solution.

Reasonable precision is required in enactment of statutes, and when this requirement is not met, such enactments may be declared to be inoperative and void for uncertainty in meaning. As said by the Supreme Court in Opinion by the Justices, (Ms.) 30 So. 2d. 14, "This power of the court may be exercised where the statute is so incomplete, so conflicting or so vague and indefinite, that the statute cannot be executed and the court is unable by the application of law and accepted rules of construction to determine what the legislature intended by any reasonable degree of certainty."

Therefore, I, perforce, must hold that this Act is inoperative and void for uncertainty and indefiniteness.

If the purpose of the Legislature, in enacting this law, was to lower the minimum age at which children may enter public schools, then that purpose would have been best accomplished had the Act read substantially as follows:

AN ACT

To amend Section 298 of Title 52 of the 1940 Code, which relates to the minimum age at which children may enter public school.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 298 of Title 52 of the 1940 Code is amended to read: "A child who will be six years of age on or before January 15th of any year shall be entitled to admission to the public elementary schools for the school year beginning prior to that date at the opening of such schools, or within two weeks thereafter; a child who is under six years of age on January 15th of any year shall not be entitled to admission to such schools during the school year beginning prior thereto, except that a child who will be six years of age on or before June first of any year may, on approval of the board of education in authority, be admitted at the beginning of the second semester of the school year beginning prior thereto to schools in school systems having semiannual promotions of pupils."

I have made this observation to the end that the Legislature, if it sees fit and so desires, may reconsider this legislation.

In answer to your second inquiry, it is my opinion that Title 52, Section 298, Code of Alabama 1940, is the law governing the entrance age of children into our public school system.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1947.

Hon. E. F. Dunbar, Chairman,
Troy City Board of Education,
Pike County,
Troy, Alabama.

**Municipal Ad Valorem Taxes—Constitutional Amendment
Proclaimed Ratified November 14, 1946.**

1. City of Troy may call an election for submission to the municipal electorate of a proposal to impose additional ad valorem taxes which, when combined with existing taxes, shall not exceed one and one-fourth ($\frac{1}{4}$) per centum.

2. The election shall be "ordered, held, canvassed, and may be contested in the same manner as is or may be provided by the laws applicable to municipal corporations for elections to authorize the issuance of municipal bonds."

3. When authorized by the electorate, the City of Troy may levy additional ad valorem taxes, which, when combined with prior taxes, shall not exceed one and one-fourth ($\frac{1}{4}$) per centum.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of August 12, 1947, is as follows:

"The Legislature of Alabama, pursuant to Act 383, Acts of 1945, page 598, proposed a constitutional amendment which authorizes municipalities, under certain conditions, to levy ad valorem taxes for certain purposes up to $1\frac{1}{4}$ per centum, with condition that an election be called authorizing such levy and further that the tax be used for specific purposes as conditioned in the election.

"Will you please advise me whether or not the City of Troy, pursuant to this amendment, has the authority to levy and collect each year an additional tax or taxes to such an extent that the total ad valorem tax rate of Troy shall not exceed $1\frac{1}{4}$ per centum in any one year on the property situated therein, based on a valuation of such property as assessed for state taxes during the preceding year; and provided further that before any such tax may be so levied and collected, a majority of the qualified electors of Troy, voting in an election for that purpose shall vote in favor of the levy thereof.

"Please advise under what other conditions, not herein stated, said levy of additional taxes may be made."

It is my opinion that the constitutional amendment proclaimed ratified on November 14, 1946 extends authority to the City of Troy to levy additional ad valorem taxes within certain limitations. The amendment reads as follows:

"ADDITIONAL MUNICIPAL TAXES.—Each municipal corporation in this state whose annual ad valorem tax rate is otherwise limited by the constitution or any amendment thereto less than one and one-fourth per centum ($1\frac{1}{4}\%$) of the value of the property situated therein as assessed for state taxation during the preceding year shall have, in addition to the power to levy and collect such ad valorem tax each year at the rate authorized immediately prior to the adoption of this amendment, the further power to levy and collect each year an additional tax or taxes to such extent that the total ad valorem tax rate of such municipal corporation shall not exceed one and one-fourth per centum ($1\frac{1}{4}\%$) in any one year on the property situated therein based on the valuation of such property as assessed for state taxation during the preceding year; provided, that before any such additional tax may be so levied and collected a majority of the qualified electors of any such municipal corporation voting at an election called for that purpose shall vote in favor of the levy thereof; provided further, that the total ad valorem tax or taxes to be levied and collected by any such municipal corporation shall not exceed one and one-fourth per centum ($1\frac{1}{4}\%$) in any one year; and provided further, that the adoption of this amendment shall in no wise affect, limit, modify, abridge or impair the power, authority or right of any such municipal corporation to levy and collect the special school taxes now or hereafter vested or conferred upon them, or any of them, under the constitution or any amendment thereto, which said special school taxes shall be in excess of said one and one-fourth per centum ($1\frac{1}{4}\%$) herein provided for. Each election held under the provisions hereof shall be ordered, held, canvassed and may be contested in the same manner as is or may be provided by the law applicable to municipal corporations for elections to authorize the issuance of municipal bonds. The ballots used at such elections shall specify the purpose for which the proposed additional rate of taxation shall be authorized and shall contain the words 'For _____% additional rate of taxation'; and 'Against _____% additional rate of taxation'; the additional rate of taxation proposed to be shown in the blank space provided therefor. The voter shall record his choice, whether for or against the additional rate shown, by placing a cross mark before or after the words expressing his choice. The proceeds of any such additional tax so authorized at any such election shall be used only for the purpose for which the same shall be authorized at such election. Elections to authorize the levy of such additional tax may be held as often as ordered by the governing body of the municipality, but when a

proposition is submitted to the electors to levy such additional tax for a specific purpose and such proposition is defeated then no second election for the same purpose shall be held in one year thereafter." (Proposed by Acts 1945, p. 598.)

It is my opinion that the City of Troy may call an election for submission to its electorate of a proposal to authorize the levy of additional taxes which, when added to the existing tax rate, shall not exceed one and one-fourth per centum ($1\frac{1}{4}\%$).

It is further my opinion that the election shall be "ordered, held, canvassed, and may be contested in the same manner as is or may be provided by the laws applicable to municipal corporations for elections that authorize issuance of municipal bonds."

The procedure to be followed in calling the election and the proposals to be submitted to the electorate shall conform to the constitutional mandates contained in the amendment aforequoted. This amendment is self-executing.

In the event of a majority vote in favor of the additional tax rate, the municipality of Troy, subject to such uses, purposes and conditions as are lawfully proposed in the election, may levy additional ad valorem taxes which, when added to the existing tax rate, shall not exceed one and one-fourth per centum ($1\frac{1}{4}\%$).

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 21, 1947.

Hon. P. C. Black,
Judge of Probate,
Geneva County,
Geneva, Alabama.

Elections—Judge of Probate—Voters' Lists—Alabama Alcoholic Beverage Control Board—Title 29, Section 68, Code of Alabama 1940—Title 17, Sections 55 and 194, Code of Alabama 1940.

1. When an election on constitutional amendments and an election to determine the classification of a county as wet or dry are held on the same day, the probate judge must furnish a separate list of the qualified voters of the county for each election.

2. Under the provisions of Title 17, Section 55, Code of Alabama 1940, the judge of probate may employ clerical help for the preparation of each of said lists, and such clerical help may be paid for the preparation of each of said lists.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of August 13, 1947, is as follows:

"There has been called and will be held in Geneva County an election to determine the sentiment of the people on whether or not alcoholic beverages may be legally sold and distributed in Geneva County as provided by Section, Title 29 Code of Alabama 1940 for August 26, 1947, the same date upon which the election is held on Constitutional Amendments Nos. 1, 2 and 3.

"The same election Officials have been by the Appointing Board named to hold each of these elections and separate ballot boxes and election supplies are being prepared and will be furnished for each of said elections.

"In view of Section 38, 138, 194, 351 and 354 of Title 17, Code of Alabama 1940, will I be required as Probate Judge to furnish to the officers of said elections a copy of the official list of voters of each District or Precinct in his county for each separate election?

"In other words, will I be required under Title 17, Section 194 to furnish, along with other election supplies a separate list of registered voters to be used in each election so that the managers may seal up the poll list and votes together with a list of the registered voters in the precinct, although the same election officials hold both elections.

"May I legally pay for the preparation of one list or two lists of registered qualified voters?"

Under the provisions of Title 17, Sections 38 and 40, Code of Alabama 1940, it is necessary that a list of the qualified electors of the county be prepared by the judge of probate for the election on the constitutional amendments to be held August 26, 1947. However, it is not necessary that this list be published in a newspaper. Biennial Report of Attorney General, 1926-1928, page 147.

Title 29, Section 68, Code of Alabama 1940, provides that an election to determine the classification of a county as wet or dry "shall be held and the officers appointed to hold same in the manner provided by law

for holding other county elections, and the returns thereof tabulated and results certified as provided by law for such elections."

In an opinion of this office found in Quarterly Report of Attorney General, Volume 6, page 82, it was held that the judge of probate is required to furnish a correct alphabetical list of the qualified electors registered by precincts immediately preceding an election to determine the classification of a county as wet or dry. This opinion further held that under the provisions of Code of Alabama 1923, Section 402, as amended (Title 17, Section 55, Code of Alabama 1940), the probate judge may employ such clerical assistants as may be necessary for the preparation of said list.

Title 17, Section 194, Code of Alabama 1940 (the section referred to in your inquiry), is as follows:

"§ 194. Count of votes to be sealed, certified and delivered to sheriff.—As soon as the ballots are all counted, the inspectors must ascertain the number of votes received for each person and for what office and must make a statement of the same in writing, which statement must be signed by them; they must also certify in writing on one of the poll lists, that such poll list is the poll list of the election precinct at which they were inspectors, the day and year on which such election was held, and for what offices, which certificates must be signed by them; and such statement of the poll lists and votes, thus certified, must be sealed up, together with a list of the registered voters in such precinct at such election on such day, in a box to be furnished by the sheriff of the county, one or more for each precinct, and to consist of wood, tin, or sheet iron, and securely fastened by locks, directed to the sheriff of the county, if there be one, and if none, then to the person discharging the duties of such office, and immediately deliver the same to the returning officer of the precinct." (Emphasis supplied.)

The two elections under consideration are separate and distinct, and should be conducted as separate and distinct elections. I note from your inquiry that you have provided separate ballot boxes for each of these elections, and that election supplies are being prepared and will be furnished for each of said elections.

In order to comply with the requirement of Section 194, *supra*, that a list of the registered (qualified) voters in such precinct at such election must be placed in the ballot box, together with a statement of the poll lists and votes, it is my opinion that a separate list of registered (qualified) voters must be furnished by you for each of the elections under consideration.

In answer to your second inquiry, your attention is called to Title 17, Section 55, Code of Alabama 1940, which is in part as follows:

"§ 55. Clerical assistants to make inspectors' list.—The judge of probate may employ such assistants and clerical help as may be necessary to complete and properly prepare the list of qualified electors which the judge of probate is required to furnish the election inspectors. Such assistants shall be paid out of the county treasury by warrants drawn by the commissioners court, board of revenue, or other governing body, on certificate of the probate judge, accompanied by the certificates of the person being paid, showing the amount is due under the provisions of this article; but the entire amount spent for such assistants and clerical help shall not exceed a sum equal to the amount obtained by multiplying the number of names on said list by five cents. * * *

Under the provisions of the above section, the judge of probate may employ clerical help to prepare the list of qualified voters required to be furnished by him to the election inspectors. However, in an opinion found in Biennial Report of Attorney General, 1936-1938, page 358, it was held that the compensation provided by Section 55, *supra*, must be paid to the clerical assistants employed to prepare the list of qualified voters and not to the judge of probate.

In an opinion of this office found in Quarterly Report of Attorney General, Vol. 8, p. 198, it was held that, "The Judge of Probate is authorized to employ clerical assistance in preparing the list of qualified electors and furnishing the same to the election officials each time a separate election is legally held in Alabama, and that each time the clerical assistance so employed may be paid for in the manner provided by Section 402, as amended, *supra*." (Section 55, *supra*.) See also Quarterly Report of Attorney General, Vol. 25, p. 180.

Answering your second inquiry, it is my opinion that, inasmuch as the two elections under consideration are separate and distinct and a list of registered voters must be furnished for each election, you may employ clerical help for the preparation of each list, and such clerical help may be paid as provided in Section 55, *supra*. In other words, you may pay clerical help for the preparation of two lists of registered (qualified) voters.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 22, 1947.

Hon. W. H. Wilson,
Judge of Probate, DeKalb County,
Fort Payne, Alabama.

Elections—Judges of Probate—Voters—Title 11, Section 29, Code of Alabama 1940—Title 17, Sections 38, 40, 54, 55, 186, Code of Alabama 1940.

1. The 1946 list of qualified voters cannot be used in the special election to be held in August, 1947.
2. The judge of probate is required to make a list of the qualified voters for the election to be held in August, 1947.
3. The judge of probate is not entitled to any compensation for preparing such list of qualified electors.
4. Under the provisions of Title 17, Section 55, Code of Alabama 1940, the judge of probate is authorized to employ special clerical assistants in preparing this list.
5. It is not necessary that this list of qualified voters be published in a newspaper.
6. The judge of probate is the proper person to requisition and order election supplies.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of June 21, 1947, is as follows:

“Are the Judges of Probate of the various Counties of the State required to make a new list of qualified voters for the forthcoming Special Election?”

“If it is legal using 1946 qualified voters list for the August Special Election, would the Judge of Probate be entitled pay for preparation and publication of such list?”

“The Judge of Probate has the responsibility of allocating election supplies in every Beat and Box of their respective Counties. In the event the supply or printing companies have an equal price for election supplies for an election regardless of whether it is a special, primary or general election. Who lawfully is designated to issue requisition and order for election supplies?”

In answer to your first inquiry, your attention is called to an opinion of this office found in Biennial Report of Attorney General, 1926-28, page 147. In this opinion it was held that under the provisions of Sections 387 and 388,, Code of Alabama 1923 (Title 17, Sections 38 and 40, Code of Alabama 1940), it was necessary that a list of the qualified electors of the county be prepared for a special election to be held April 12, 1927. This opinion further held that it was not necessary that this list be published in a newspaper.

In answer to your second inquiry, your attention is called to Title 17, Section 55, Code of Alabama 1940, which is in part as follows:

"The judge of probate may employ such assistants and clerical help as may be necessary to complete and properly prepare the list of qualified electors which the judge of probate is required to furnish the election inspectors. Such assistants shall be paid out of the county treasury by warrants drawn by the commissioners court, board of revenue, or other governing body, on certificate of the probate judge, accompanied by the certificates of the person being paid, showing the amount is due under the provisions of this article; but the entire amount spent for such assistants and clerical help shall not exceed a sum equal to the amount obtained by multiplying the number of names on said list by five cents. * * * "

Under the provisions of the above section, the judge of probate may employ clerical help to prepare the list of qualified voters required to be furnished to the election inspectors. However, in an opinion found in Biennial Report of Attorney General, 1936-38, page 358, it was held that the compensation provided by Section 55, supra, must be paid to the clerical assistants employed to prepare the list of qualified voters and not to the judge of probate.

There is no statute authorizing any compensation for the judge of probate for preparing the list under consideration. This list is not to be confused with the list of registered voters which the judge of probate is required to make annually under the provisions of Title 17, Section 54, Code of Alabama 1940. Under the provisions of Title 11, Section 29, Code of Alabama 1940, the judge of probate is entitled to two and one-half cents for each name on the list of registered voters required to be made by Section 54, supra.

Specifically answering the inquiries contained in the first two paragraphs of your request, it is my opinion (1) that the 1946 list of qualified voters cannot be used in the special election to be held in August, 1947; (2) that the judge of probate must prepare a list of qualified electors to be used in said special election; (3) that the judge of probate is not entitled to any compensation for preparing such list of qualified voters; (4) that under the provisions of Title 17, Section 55, Code of Alabama 1940, the judge of probate is authorized to employ special clerical assistants in preparing this list; and (5) that it is not necessary for such list to be published in a newspaper.

In answer to your last inquiry, your attention is called to Title 17, Section 186, Code of Alabama 1940, which is as follows:

"§ 186. Blank forms and stationery for election.—The judge of probate for each county shall have printed, at the expense of the county, ballots, blank poll lists, certificates of results, oaths, and any other stationery or blank forms necessary in the conduct of election. The judge of probate shall also superintend and insure the delivery by the sheriff to the inspectors of the election of the ballots, blank poll lists, certificates of results, oaths and other stationery or blank forms necessary in the conduct of the elections."

It will be seen from the above section that it is the duty of the judge of probate to have the election supplies printed at the expense of the county.

It is, therefore, my opinion that the judge of probate should requisition and order election supplies.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 22, 1947.

Hon. I. C. Wheelis, Register,
Circuit Court,
Russell County,
Phenix City, Alabama.

Register—Circuit Court—Title 41, Section 138, Code of Alabama 1940.

Public funds deposited to the credit of deceased register of the circuit court may be withdrawn by the legally qualified successor appointed by the judge of the circuit court.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of July 28, 1947, is as follows:

"On July 18, 1947, the Hon. W. L. Hobbs, Register of the Circuit Court of Russell County, Alabama, in Equity, died at his home here in Phenix City, thus creating a vacancy in the office of the Register. On July 19th, the undersigned was officially appointed as Register to succeed Mr. Hobbs by the Hon. J. S. Williams, Judge of the Third Judicial Circuit. Since the appointment, I have made bond as required by law, taken the oath of office, and re-

ceived my commission from the Secretary of State; and am now acting and doing business as the Register of this court.

"The question has arisen in the mind of Mr. C. L. Mullin, President of the Phenix-Girard Bank (the depository designated by the County Commission) as to whether or not he can transfer the funds that were in Mr. Hobbs' name, as Register, into the Register's account under my name without an audit being made of the account. Mr. Hobbs' accounts were examined up to January 31, 1947, at the last yearly examination.

"Please render an official opinion to this office stating what steps are necessary before the funds of the late W. L. Hobbs can be transferred to I. C. Wheelis as the present Register of the Circuit Court of Russell County, Alabama, in Equity.

"We would appreciate an opinion at the earliest possible moment, as our monthly reports are due to be made on the last day of each month."

Answering your inquiry, your attention is directed to Title 41, Section 138, Code of Alabama 1940, which is as follows:

"§138. If in possession of any other person, proceedings to recover.—If any person holding any office in this state dies, or his office in any way becomes vacant, and any books, papers, or property belonging or appertaining to such office come into the possession of any person, the qualified successor to such office may, in the manner before prescribed in this article, demand such books, papers, or property from the person having the same in his possession, and on the same being withheld, an order may be obtained; and the person charged may, in like manner, make oath of the delivery of all such books, papers, and property that ever came into his possession; and in case of his failure to make such oath and to deliver up the books, papers, or property so demanded, such person must be committed to jail, and a search warrant may be issued, and the books, papers, or property seized by virtue thereof and delivered to the complainant, as hereinbefore prescribed."

Since you have been appointed Register of the Circuit Court of Russell County and have legally qualified, you have acquired all the rights and authority of the former register of the circuit court and are entitled to withdraw the public funds now on deposit in the county depository. The above quoted section states that all you have to do is make demand on the designated depository for the transfer of the funds. This section prescribes a penalty in case of a failure to comply with your demand. Cf. Quarterly Report of Attorney General, Volume 21, Page 220.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 22, 1947.

Hon. G. C. Brittain,
Judge of Probate,
Calhoun County,
Anniston, Alabama.

Auctioneers—Licenses—Title 51, Section 461, Code of Alabama 1940.

1. Under the provisions of Title 51, Section 461, Code of Alabama 1940, an auctioneer is only required to purchase one state license.

2. An auctioneer who desires to follow his profession in more than one county may do so by the payment of one state license of fifty dollars and an additional license of twenty-five dollars in each county in which he follows his profession.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of May 8, 1947, is as follows:

"We would like to have your official opinion on the following question:

"Is it mandatory that an Auctioneer who lives in Alabama and buys state and county license in the county in which he lives be required to buy a state license in each and every other county in which he may desire to do business?"

"Section 461 of Alabama Code states 'Auctioneers in any town or city of twenty thousand inhabitants or more or within five miles thereof, fifty dollars;----. The payment of the license above required shall authorize the doing business only in the county where paid. Each transient or itinerant auctioneer shall pay one state license of fifty dollars, and in addition a county license of twenty-five dollars in each county where he sells by auction.'

"We had an Auctioneer from our neighboring County Etowah come to us for license to do business in Calhoun. He had purchased state and county license in Etowah. We sold him another license and

charged him for state and county. We would like to know if we were correct in collecting another state license.

"Your opinion on this question will be appreciated."

In answer to your inquiry, you are advised that an auctioneer is only required to purchase one fifty dollar state license, and after the purchase of this state license he may do business in as many counties as he sees fit by the payment of an additional twenty-five dollar license in each county in which he so does business.

The pertinent part of Title 51, Section 461, Code of Alabama 1940, reads as follows:

"Auctioneers in any town or city of twenty thousand inhabitants or more or within five miles thereof, fifty dollars; * * * * The payment of the license above required shall authorize the doing of business only in the county where paid. Each transient or itinerant auctioneer shall pay one state license of fifty dollars, and in addition a county license of twenty-five dollars in each county where he sells by auction." (Emphasis supplied)

It is to be noted from the above quoted part of Section 461 that the payment of the initial state license shall authorize the doing of business only in the county where such license is paid. It is likewise to be noted that each transient or itinerant auctioneer shall pay only one state license of fifty dollars, and an additional license of twenty-five dollars in each county where he sells by auction.

In my opinion, the auctioneer referred to in your letter may be termed a transient or itinerant auctioneer, and, therefore, is liable for only one state license of fifty dollars.

Specifically answering your question, you were not correct, in my opinion, in charging the auctioneer referred to in your letter a state license after he had paid one state license in Etowah County if the amount of such state license was fifty dollars. The only license for which this person would be liable in Calhoun County would be the additional twenty-five dollar county license imposed on transient or itinerant auctioneers by Section 461, supra.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 22, 1947.

Hon. H. W. McKenzie,
Treasurer, Marion County,
Hamilton, Alabama.

Solicitors—Costs and Fees—Funds—Title 11, Section 86, Code of Alabama 1940—Title 13, Sections 242 and 245, Code of Alabama 1940.

1. Solicitors' fund established by Section 5512 of the Code of Alabama 1923 has been abolished, since said section was omitted from the Code of Alabama 1940 and consequently repealed.

2. Solicitors' fees on convictions in county or inferior courts are paid into general fund of county (Title 11, Section 86, Code of Alabama 1940), and solicitors' fees on convictions secured by a solicitor who is paid a salary by the State are paid into State Treasury (Title 13, Section 242, Code of Alabama 1940).

3. Commissions of salaried solicitors on fines and forfeitures, under Title 13, Section 245, Code of Alabama 1940, are paid into the county treasury for the credit of the fine and forfeiture fund, or, if there is no fine and forfeiture fund, into the general fund of the county, whether the same arises from cases in the county, inferior or circuit courts.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your letter requesting an official opinion, bearing date of March 27, 1947, is as follows:

"By Local Act of 1943, page 7, the salary of the County Solicitor is required to be paid from the General Fund of the County. We have been paying this salary from the Solicitor Fee Fund, and the examiners have called to my attention the requirement of the above mentioned Local Act.

"The examiners have suggested that it would be desirable to close out the Solicitor Fee Fund into the General Fund, and hereafter credit all Solicitor Fees to the General Fund.

"They have suggested that I write you as to the propriety of this procedure, and I am now following their suggestion.

"Your early opinion on this matter will be greatly appreciated."

In answer to your inquiry, it is my opinion that it would be proper "to close out" your so-called solicitors' fee fund into the general fund of the county, and hereafter to credit all solicitors' fees arising in the county or inferior courts to the general fund of the county.

Section 5512, Code of Alabama 1923, relating to the solicitors' funds of a county, was omitted from the Code of Alabama 1940 and consequently repealed.

Title 11, Section 86, Code of Alabama 1940, provides as follows:

"§ 86. Solicitors' fees; how taxed and collected.—For every conviction for a misdemeanor in the county courts or inferior courts there shall be taxed and collected as a part of the costs and paid into the county treasury the same solicitor's fees provided for conviction in such cases in the circuit court, provided that in the event of an appeal to the circuit court no solicitor's fees shall be taxed or collected for the services of a solicitor in the circuit court."

Title 13, Section 242, Code of Alabama 1940, provides as follows:

"§ 242. Fees of salaried solicitors paid into state treasury.—All fees which may be by law taxed as solicitors' fees against defendants on convictions secured by a solicitor who is paid a salary by the state, belong to the state, and, when collected, must be paid into the state treasury."

Generally, under Title 11, Section 86, *supra*, the solicitors' fees on convictions in misdemeanor cases in county or inferior courts are paid into the county treasury, which means the general fund of the county. On the other hand, the solicitors' fees on convictions secured by a solicitor who is paid a salary by the state are paid into the state treasury under the provisions of Title 13, Section 242, *supra*.—Cf. Biennial Report of Attorney General, 1936-1938, page 135. For exception as to Jefferson County, see Quarterly Report of Attorney General, Vol. 39, page 38.

Your attention is directed to Title 13, Section 245, Code of Alabama 1940, which deals with the commissions of solicitors as distinguished from solicitors' fees. This section is as follows:

"§ 245. Commissions on fines and forfeitures to be paid into county treasury.—The five percent commissions which such salaried solicitors are entitled to receive on fines and forfeitures must, when collected, be paid into the county treasury to the credit of the fine and forfeiture fund; provided, however, that if no such fund exists, then said commissions shall be paid into the county treasury to the credit of the general fund."

The commissions referred to in the above section must, when collected, be paid into the county treasury to the credit of the fine and forfeiture fund, whether the same arises from cases in the county, inferior or circuit courts, provided, that in a county that has no fine and forfeiture fund, such commissions must be paid into the general fund of the county.—Biennial Report of Attorney General, 1936-1938, page 135, *supra*.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

August 22, 1947.

Hon. J. G. Kimbrough,
Judge of Probate,
Washington County,
Chatom, Alabama.

Notary Public—Officers and Offices—

1. A person must be a qualified elector in order to qualify to hold the office of notary public.
2. A person who fails to pay his poll tax before February 1, unless exempted therefrom by law, is not a qualified elector.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of April 30, 1947, is as follows:

“A person has been a legal qualified Voter for some years past, but failed to pay his poll tax for the year 1946. Could Appointee for Notary Public from State at Large legally qualify with the Probate Judge under this condition?”

A notary public is a public officer. In order to qualify for the office of notary public, a person must be a qualified elector. Quarterly Report of Attorney General, Volume 20, page 56.

A person who fails to pay his poll tax before February 1, unless exempted therefrom by law, is not a qualified elector. Quarterly Report of Attorney General, Volume 20, page 123.

In view of the holding in the above opinions, your inquiry must be answered in the negative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 25, 1947.

Hon. O. E. Cole,
Chairman,
The Court of County Commissioners,
Russell County,
Phenix City, Alabama.

Court Reporters—Special—Title 13, Section 265, Code of Alabama 1940—Title 13, Section 267, Code of Alabama 1940, as amended by Act No. 591, General Acts 1943, page 596.

Special court reporter's compensation cannot exceed that of the official court reporter, and hence a special reporter is not entitled to additional compensation to cover travel and living expenses.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of April 11, 1947, is as follows:

"As Chairman of the Court of County Commissioners of Russell County I am requesting an official opinion upon the following:

"Judge J. S. Williams of this Circuit is without an all time Court Reporter and he secured the services of Linton C. Warren of Dothan, Alabama, to report during the spring term of our Circuit. Mr. Warren filed a claim as follows:

"Actual expenses incurred in attending Court (Circuit) of Russell County, Alabama, during criminal session of said Court beginning March 31, 1947

"Mileage from Dothan, Ala. and return 200 miles 0.5 cts.....	\$10.00
Hotel expense—Room and meals.....	29.60
While acting as special court reporter under appointment by Hon. J. S. Williams.	

\$39.60'

"I have quoted this claim in full and am requesting an opinion as to whether or not it is a legal charge upon Russell County."

It is my opinion that the claim in question is not a legal charge against Russell County.

Title 13, Section 265, Code of Alabama 1940, provides in part:

"Should the official court reporter herein provided for, on account of sickness or other cause, be unable to report the testimony of any trial as provided in this article the judge of the court may appoint a special reporter to serve until the official reporter can resume his duties in such court, the compensation of such special reporter to be the same and paid in like manner as herein provided for official court reporters" (Emphasis supplied.)

Title 13, Section 267, Code of Alabama 1940, as amended by Act No. 591, General Acts 1943, page 596, approved July 10, 1943, provides that the salary of the official court reporter shall be \$2,800 per annum. This Act thus increased the salary of the court reporter from \$2,400 to \$2,800 and further provides:

"(c) Should any law be held to remain in effect other than those excepted in the first sentence of subdivision (b) of this section under which a court reporter is allowed extra allowances or compensation for traveling expenses, then the amount allowed by such law shall be deducted from the amount hereinbefore provided to be paid by the counties embraced in such judicial circuit." (Emphasis supplied.)

Act No. 591, supra, excepts from its operation special, local, or general laws fixing the salary or compensation of an official court reporter in judicial circuits having three or more circuit judges, and then provides:

"All other special, local, or general laws in conflict with this section, including all laws providing allowances or expenses for any Court Reporter, are hereby expressly repealed." (Emphasis supplied.)

It has been held that an official court reporter serving either court of a circuit presided over by two circuit judges during the illness of the second official court reporter is not entitled to additional compensation or expenses for such service. See Quarterly Report of Attorney General, Vol. 18, p. 229, where it was said:

"The fact that Mr. Swann incurred certain expenses in making the trip to Talladega to report the testimony as outlined by you, cannot, in my judgment, be considered. The official duties of the court reporter, as contemplated by the above quoted statutes, provide compensation which, in my judgment, must include the expenses named."

It has also been held that there is no authority in law for appointing a special court reporter for a circuit court except as provided by Title 13, Section 265, Code of Alabama 1940, and this appointment must be on account of sickness or other cause making the official reporter unable to take the testimony at any trial. Quarterly Report of Attorney General, Vol. 17, p. 128.

It has been held that the per diem compensation of a special court reporter cannot, under the statute, exceed the per diem compensation of the official court reporter; and that this restriction cannot be evaded by paying a special reporter for a greater number of days than he actually works. Biennial Report of Attorney General, 1928-30, p. 378.

Since an official court reporter is not entitled to claim traveling expenses, for the reason that his official duties are deemed to include necessary travel, and since Section 265, supra, states that the compensation of a special reporter shall not exceed that of an official reporter, it is my opinion that the claim in question is not a legal charge against Russell County.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

August 25, 1947.

Hon. Phillip J. Hamm,
Commissioner of Revenue,
Department of Revenue,
Montgomery, Alabama.

Lotteries—Gaming—Title 14, Section 275, Code of Alabama
1940—Title 51, Section 579, Code of Alabama 1940.

✓ The operation of punch boards in Alabama, where a charge is made for each punch, the purchaser of the punch either winning nothing or a fixed prize, is a lottery within the meaning of Title 14, Section 275, Code of Alabama 1940, and is illegal; but, if such punch boards are operated, the tax imposed by Title 51, Section 579, Code of Alabama 1940, must be collected.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of May 28, 1947, is as follows:

"An official opinion is requested with respect to the following matter:

"The Booker T. Washington Birthplace Memorial has entered into a contract with a corporation in Chicago, Illinois, by which the Memorial agrees to sell to the corporation and the corporation agrees to purchase a specified number of the Booker T. Washington Memorial half-dollars. The corporation will place these half-dollars on punch boards that will be distributed for use in Alabama.

"The Booker T. Washington Birthplace Memorial will use its proceeds from the sale of these half-dollars to the corporation to establish a field service system with its headquarters at Rocky Mount, Virginia. Extensions will be established throughout the Southern States, including Alabama. The work of the field service system will consist of holding workers institutes and meetings for the instruction of colored people who are employed in industry and in service occupations. This type of instruction will be carried out within this State.

"The Booker T. Washington Birthplace Memorial is a charitable organization and has requested me to permit the distribution within this State of the above described punch boards without imposing the ten per cent tax levied under the provisions of section 579, Title 51, Code of Alabama 1940, in order to permit a wider distribution of such punch boards within this State.

"The aims and purposes of the Booker T. Washington Birthplace Memorial are worthy and commendable, and it is my desire to further their accomplishment by any legal means that I can; but I am unaware of any provision of law that will permit me to waive the tax levied by section 579, supra, or to give permission for the use of punchboards within this State. Will you please inform me whether the operation of punch boards within this State is legal; and if it is legal, whether the operation thereof can be permitted without the imposition of the tax levied by section 579, supra."

In answering your inquiry, I assume that the corporation intends to operate the punch boards in the manner in which they are usually operated, i. e., charge a certain amount for each punch, the holder of the winning punch to receive the Booker T. Washington Memorial half dollars.

Title 14, Section 275, Code of Alabama 1940, is as follows:

"§ 275. Carrying on or representing lottery; selling tickets in same.—Any person who sets up, carries on, or is concerned in setting up or carrying on any lottery or device of like kind, or any gift enterprises, or any scheme in the nature of a lottery or gift enterprise; or who sells or disposes of any lottery or gift enterprise ticket, or ticket in any scheme in the nature of a lottery or gift enterprise; or who shall receive money or take an order for any lottery or gift enterprise ticket, or any ticket in any scheme in the nature of a lottery or gift enterprise; or who is interested or concerned in selling or disposing of any ticket in any lottery or gift enterprise, or scheme in the nature of a lottery or gift enterprise; or who shall act for or represent any other person in selling or disposing of any such ticket, shall, on the first conviction, be fined not less than twenty-five nor more than five hundred dollars; and, on the second conviction, shall be fined not less than fifty nor more

Slot Machine Licenses Sold As Fines Levied

ATTORNEY GENERAL OF

than five hundred dollars, and shall also be imprisoned in jail, or sentenced to hard labor for the county for not more than thirty nor more than ninety days; and on a second conviction, shall be fined not less than one thousand dollars, and shall also be imprisoned in jail, or sentenced to hard labor for the county for not more than twelve months."

A punch board consisting of a board with slips calling for prizes are inserted, the prize being ten cents, and the purchaser of the punch board a fixed prize, is a lottery within the meaning of the statute. *Brewer v. Woodham*, 15 Ala. App. 678, 74 So. 2d 100.

In the case of *Casmus v. Lee*, 236 Ala. 51, 194 Ala. 51, Section 579, Code of Alabama 1940) did not prohibit the use of punch boards which were illegal, but merely imposed a tax for the operation of such boards. The fact that punch boards were illegal did not make the tax imposing the tax.

In view of the holding of the case of *Casmus v. Lee*, provisions of Section 275, supra, it is my opinion that the use of punch boards in this State would be illegal; and, if operated, the tax imposed by Title 51, Section 579, Code of Alabama 1940, must be collected.

MOBILE, Ala. Sept. 21—(P)—Mobile County was selling slot machine licenses in one department and fining men accused of possessing the machines in another today.

The county license commissioner's office reported it had collected \$7,025.50 in two days from the sale of 23 licenses to private clubs.

Meanwhile, four men were fined \$50 and costs in Inferior Court on charges of possessing gaming devices. Sheriff's deputies filed the charges after they said they found slot machines in possession of the defendants.

State Solicitor Carl M. Booth has instituted condemnation proceedings against six slot machines seized by sheriff's officers during a county-wide gambling cleanup.

He asked permission to have the machines smashed, and to divide their contents between the county government and the officers who seized them.

County License Commissioner Pat Byrne said licenses were being sold under a state statute which provides for licensing of slot machines for gaming.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 25, 1947.

Hon. N. M. Payne,
Clerk-Treasurer,
City of Huntsville and
Custodian of School Funds
for the City Board of Education
of Huntsville, Madison County,
Huntsville, Alabama.

Title 52, Section 177, Code of Alabama 1940—Constitution of Alabama 1901, Section 94—City Superintendent of Schools—Compensation upon termination of employment.

1. Custodian of school funds of the City Board of Education of the City of Huntsville not authorized to pay city superintendent of schools beyond the termination date of his services.

than five hundred dollars, and shall also be imprisoned in the county jail, or sentenced to hard labor for the county, for not less than thirty nor more than ninety days; and on the third or any subsequent conviction, shall be fined not less than one hundred nor more than one thousand dollars, and shall also be imprisoned in the county jail, or sentenced to hard labor for the county, for not less than six nor more than twelve months."

A punch board consisting of a board with holes in which blank slips and slips calling for prizes are inserted, the price for punching a hole being ten cents, and the purchaser of the punch either winning nothing or a fixed prize, is a lottery within the meaning of Section 275, supra. **Brewer v. Woodham**, 15 Ala. App. 678, 74 So. 763.

In the case of **Casmus v. Lee**, 236 Ala. 396, 183 So. 185, it was held that the statute authorizing a revenue stamp tax on punch boards (Title 51, Section 579, Code of Alabama 1940) did not authorize the operation of punch boards which were illegal, but merely imposed an occupational tax for the operation of such boards. This case further held that the fact that punch boards were illegal did not invalidate the statute imposing the tax.

In view of the holding of the case of **Casmus v. Lee**, supra, and the provisions of Section 275, supra, it is my opinion that the operation of such punch boards in this State would be illegal; but, if such punch boards are operated, the tax imposed by Title 51, Section 579, Code of Alabama 1940, must be collected.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 25, 1947.

Hon. N. M. Payne,
Clerk-Treasurer,
City of Huntsville and
Custodian of School Funds
for the City Board of Education
of Huntsville, Madison County,
Huntsville, Alabama.

Title 52, Section 177, Code of Alabama 1940—Constitution of Alabama 1901, Section 94—City Superintendent of Schools—Compensation upon termination of employment.

1. Custodian of school funds of the City Board of Education of the City of Huntsville not authorized to pay city superintendent of schools beyond the termination date of his services.

2. A contract, whereby a city superintendent of schools is employed for a definite term, would not prevent removal of said superintendent before the expiration of said term for the causes set out in Title 52, Section 177, Code of Alabama 1940.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of August 18, 1947, is as follows:

"I am Clerk-Treasurer of the City of Huntsville and Custodian of the school funds for the City Board of Education of Huntsville.

"In February of this year, the City Board of Education of Huntsville entered into a contract with the present Superintendent of the Huntsville City School System for one year beginning July 1, 1947, and ending June 30, 1948.

"It is my understanding that this Superintendent may resign in the near future with the understanding that he will be paid the full amount of his salary for the year July 1, 1947-June 30, 1948, as provided in the contract which he entered into with the City Board of Education of Huntsville last February. In such an event, the City Board of Education would proceed to select another Superintendent of the City School System.

"Should these events materialize, I desire your official opinion as to whether or not I, as Custodian of the school funds for the City Board of Education of Huntsville, would be authorized to pay this Superintendent the full amount of his salary for the year July 1, 1947-June 30, 1948, as provided for in the contract which he has entered into with the City Board of Education of Huntsville, upon receipt of an order from the City Board of Education so directing me."

It is my opinion that your question is properly answered in the negative.

The appointing authority of a city superintendent of schools is contained in Title 52, Section 177, Code of Alabama 1940. This code section reads as follows:

"§177. Appointment, compensation and removal.—The city board of education may appoint a city superintendent of schools to hold office at the pleasure of the board. The city superintendent of schools shall receive such compensation as the city board of education shall direct. The city board of education may remove the city su-

perintendent of schools for incompetency, immorality, misconduct in office, wilful neglect of duty, or when, in the opinion of the board, the best interests of the schools require it."

Unquestionably, the intent of the legislature was to invest the city board of education with authority to compensate a city superintendent of schools for services rendered, and for services rendered only. Considered in any other light, remuneration for services not performed would in effect be a donation of public funds to an individual.

You state in your request for an opinion that it is anticipated that the city superintendent of schools may "resign" with the understanding that he be paid the full amount of his contract for the period stipulated. It is my opinion that such an understanding cannot attach to any resignation tendered, and a payment in the manner described would be an unlawful expenditure of public funds.

If and when the city superintendent's resignation is concluded, his services cease as of the effective date of such resignation. This office, in an opinion reported in *Quarterly Report of Attorney General*, Vol. 27, p. 72, held in effect that a public employee may not be paid beyond the date of his lawful termination of services. To do so would, as stated, be in effect a donation of public funds to an individual. Constitution of Alabama 1901, Section 94, stands as an insuperable barrier to the legislature delegating such authority to the city board of education. This constitutional section reads as follows:

"§94. The legislature shall not have power to authorize any county, city, town or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

Under such authority, the only way that any possible public moral obligation to the lawfully discharged employee may be satisfied is by a special relief act of the legislature, assuming the legislature were to determine that money expended therefor would be in the acquittance of a moral obligation due by the public to the lawfully discharged employee. See *Quarterly Report of Attorney General*, Vol. 27, p. 72, referred to, *supra*.

Assuming that the city superintendent of schools you refer to were to refuse to resign his position in view of the above holding—your attention is again directed to Title 52, Section 177, Code of Alabama 1940, quoted in the first portion of this opinion. You will note that authority is vested in the city board of education to remove such individual for "incompetency, immorality, misconduct in office, wilful neglect of duty, or when, in the opinion of the board, the best interests of the schools re-

quire it." The latter cause (underscored) is particularly broad in scope, but, in any event, all such causes are questions of fact which must be duly established. You are, therefore, advised that it is my opinion that a hearing to determine the facts made the basis for removal must first be had to see whether or not sufficient cause exists to substantiate said removal. If, after due procedure, cause for removal is found to exist under the provisions imposed by this code section, then the city superintendent of schools may be removed immediately thereafter, notwithstanding the contract period stipulation. This office, in Quarterly Report of Attorney General, Vol. 23, p. 66, held in part as follows:

"A contract, whereby a city superintendent of education is employed for a definite term, would not prevent a removal of said superintendent before the expiration of said term for the causes set out in Section 219 of the School Code of 1927."

Section 219 of the School Code of 1927 corresponds with Title 52, Section 177, Code of Alabama 1940, here under discussion.

It is concluded from the interpretations herein discussed and the authorities I have cited, that you, as custodian of the school funds of the City Board of Education of the City of Huntsville, are not authorized to pay the city superintendent of schools the full amount of his salary under the conditions stated and you are herewith advised accordingly.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 26, 1947.

Honorable John Graves,
State Comptroller,
CAPITOL.

Court Reporters—Special Court Reporters—Compensation.

Title 13, Section 261, Code of Alabama 1940—Title 13, Section 265, Code of Alabama 1940—Act No. 591, General Acts 1943, page 596—Act No. 138, General Acts 1933, page 124.

1. A person serving as official court reporter of a judicial circuit of the state may, when not engaged in the discharge of his official duties in such circuit, be appointed and serve as special court reporter of another judicial circuit of the state.

2. Such person so serving as a special court reporter is entitled to the compensation provided by law for such services.

3. Neither the office of official court reporter nor special court reporter is an office of profit within the meaning of the Constitution of Alabama 1901, Section 280, or Title 41, Section 5 (7), Code of Alabama 1940.

4. The provisions of Title 41, Section 150, Code of Alabama 1940, are not applicable to an official court reporter of a judicial circuit of the state who is appointed and serves as special court reporter of another judicial circuit.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of April 8, 1947, is as follows:

"Please refer to Section 5 of Title 41, Code of Alabama 1940, under which it will be noted that no person shall hold two offices of profit at one and the same time under this State. See Section 280 of the Constitution. Also see Report Attorney General 1936-38, page 137, and also Report Attorney General 1926-28, page 462.

"Also please refer to Section 261 of Title 13, Code of Alabama 1940, under which it will be noted that no two or more judges shall appoint the same court reporter.

"I have been requested to issue two warrants in favor of the same court reporter for services rendered in two different Judicial Circuits at one and the same time. Both claims cover and would duplicate payment for the month of August 1946.

"Please advise me whether I am authorized to issue both of these warrants under Section 265 of Title 13, Code of Alabama 1940, which Section makes provision for special reporter in case of sickness of the regular reporter."

It is my opinion that your inquiry should be answered in the affirmative.

As I understand the situation presented by your letter, a person employed as an official court reporter in one of the judicial circuits of the state has been appointed, and served for a period of approximately one month as special court reporter of a judicial circuit other than that for which he is official court reporter. You have now been requested to issue a state warrant as compensation for that portion of the amount due such person from the state as payment for the services rendered as special court reporter. You inquire as to your authority to issue such warrant, in view of the fact that such person has already been issued a

state warrant for this same period as compensation for that portion of the salary due such person from the state for services rendered as official court reporter of the judicial circuit for which he is appointed.

In order to answer your inquiry, it is necessary to refer to the statutes governing the appointment, duties, and compensation of court reporters.

Title 13, Section 261, Code of Alabama 1940, provides that each of the judges of the circuit courts of this state shall appoint a competent shorthand reporter to perform the duties of official court reporter of the courts in the circuit over which said judge presides, with the further provision that no two or more judges shall appoint the same court reporter. It is likewise provided in this section that such official court reporter shall hold office at the pleasure of the judge appointing him, who shall have power to remove said official reporter at any time.

By virtue of this section, a person appointed as an official court reporter is required only to serve those courts of the circuit over which the judge appointing him presides. He is not required to serve any court located outside the circuit for which he is appointed as official court reporter. It is also to be noted that such person holds office at the pleasure of the judge appointing him, and may be removed from such office at any time by such judge.

Act No. 591, General Acts 1943, page 596, provides that an official court reporter shall receive as compensation for those services rendered as official reporter of the circuit for which he is appointed a salary of \$2800.00 per year, \$2200.00 of which shall be payable in monthly installments by the counties composing the circuit, each county to pay its pro rata share of such salary, based upon the assessed tax valuation of all property of such county for the preceding year, and the remaining \$600.00 to be paid in equal monthly installments on the warrant of the State Comptroller from the general funds in the state treasury. In addition to such compensation, an official court reporter receives, of course, those fees to which he is entitled by law.

It should be noted that the salary fixed by law to be paid official court reporters is fixed upon an annual basis, and that it is provided only as a system, or means of payment, that such annual salary be paid in monthly installments. It is my opinion that it was not contemplated that the monthly installments of the annual salary paid an official court reporter should necessarily represent payment for services rendered during that specific month, but rather that such payments merely represent a partial payment for the services rendered by such reporter upon an annual basis.

It is likewise of interest to note that portion of Title 13, Section 265, Code of Alabama 1940, which provides that in circuits having two or more judges, the court reporter shall, when not engaged in the discharge

of his official duties, be subject to the direction of any judge of such circuit. Although not pertinent to your inquiry, it is my conclusion that such provision is added proof of the fact that it was not contemplated that an official court reporter should at all times be occupied with the duties of his office, but rather that such official reporter be required to perform certain duties in connection with the court throughout the year, which duties would not, of necessity, occupy the full time of such reporter. For the performance of such duties, the official reporter is paid the annual salary prescribed by law.

Next considered are the provisions of Section 265, supra, which section is the sole authority for the appointment of special court reporters. This section provides as follows:

"Should the official court reporter herein provided for, on account of sickness or other cause, be unable to report the testimony of any trial as provided in this article, the judge of the court may appoint a special reporter to serve until the official court reporter can resume his duties in such court, the compensation of such special reporter to be the same and paid in like manner as herein provided for official court reporters. In circuits having two or more judges, the court reporter shall, when not engaged in the discharge of his official duties, be subject to the direction of any judge of such circuit, it being the intention and purpose of this provision to avoid the necessity of appointing a special reporter whenever any official court reporter of the circuit is available."

Under the authority of this section, a circuit judge appointing a special court reporter can only do so under certain conditions; and the person so appointed is employed upon a temporary basis only, to serve until the official court reporter can resume his duties in such court. It is likewise provided that the compensation of those persons appointed as special court reporters shall be the same and be paid in the same manner as the compensation of official court reporters.

The questions arising, therefore, are (1) whether or not a judge of one of the judicial circuits of the state may lawfully appoint as a special court reporter a person already regularly employed as the official court reporter of another judicial circuit of the state; and (2) if such appointment is made, may the person appointed be paid the compensation provided by law for the services rendered as special court reporter?

In my opinion, both of these questions should be answered in the affirmative.

Construing the provisions of Section 265, supra, dealing with the appointment of special court reporters, I see no prohibition against an official court reporter, when not engaged in the discharge of his official duties in the circuit in which he serves as official court reporter, being appointed as a special court reporter to serve in a circuit other than that

for which he is regularly appointed. I am also of the opinion that if he renders such services as special court reporter, he should receive the compensation allowed therefor.

In this connection, it should be remembered that an official court reporter is not required to serve any court outside the circuit for which he is appointed; hence, any services rendered as special reporter to any court located outside the circuit for which he is regularly appointed would, of necessity, be services rendered upon a voluntary basis. It should also be remembered that an official court reporter holds office at the pleasure of the judge appointing him, and that he is subject to the direction of such judge. Therefore, any departure from the circuit for which he is appointed as official reporter to another circuit to serve as special reporter, would, of necessity, be with the consent of the judge of the court he serves as official reporter. Since, as official reporter, such person is subject to the direction of the judge appointing him, he could either be denied permission to serve as special reporter of another circuit, or, if so serving, could be required to return to his own circuit should the occasion therefor arise. Hence, no valid objection can arise to the effect that to so serve as a special reporter would constitute an abandonment or dereliction of his duties in the circuit for which he is official reporter.

In your request you mention the constitutional and statutory prohibitions against any person holding two offices of profit under the state, at one and the same time. You correctly cite such prohibitions as Constitution of Alabama 1901, Section 280, and Title 41, Section 5, Code of Alabama 1940.

However, such provisions are inapplicable to the instant case, inasmuch as neither the office of official court reporter nor special court reporter is an "office of profit" within the meaning of Constitution of Alabama 1901, Section 280, or Title 41, Section 5, Code of Alabama 1940. An "office of profit" within the meaning of these prohibitions has been defined as being any state, county or municipal office, whether elective or appointive, carrying with it as a necessary incident to its exercise some part of the sovereign power of the state, with the term and salary or prerequisites of such office being filed by law. *State ex rel. Glenn v. Wilkinson*, 220 Ala. 172, 124 So. 211.

Likewise, the Court of Appeals in the case of *Stone, County Treasurer, v. State ex rel. Strain*, 18 Ala. App. 228, 89 So. 824, in discussing the position of court reporter with relation to Section 281 of the Constitution of Alabama 1901, made the following observation:

"Taking the acts of the Legislature upon the subject of official court reporters and construing them in their entirety, there is no difficulty in concluding that the Legislature never intended to clothe the position of court reporter with the functions and attributes of an officer. A court reporter is an employee or attache of the court

without any of the characteristics of an office holder under section 281 of the Constitution. *Harrington v. Van Hayes*, 200 Ala. 480, 76 South. 422."

Therefore, clearly, one holding the position of official court reporter does not hold an "office of profit" within the meaning of the constitutional or statutory provisions above cited inasmuch as such person has no term of office, but merely holds office at the pleasure of the judge appointing him, such judge being empowered to remove such official reporter at any time. Such being true, these constitutional and statutory prohibitions, which deal with the holding of two offices of profit at one and the same time, have no application to this question; nor are they any bar to one being appointed as a special court reporter while serving another circuit as official court reporter.

The former opinions of this office, referred to by you in your letter, deal with the question of the holding of two offices of profit, and are, therefore, inapplicable to this inquiry.

You also refer to that portion of Title 13, Section 261, Code of Alabama 1940, which provides that no two or more judges shall appoint the same court reporter. In my opinion, this proviso deals only with, and has reference only to, official court reporters. This prohibition is only against two judges appointing the same official court reporter. I do not view such provision as a bar to the appointment of an official court reporter of one circuit, when not engaged in the discharge of his official duties in such circuit, as special court reporter of another circuit. The reason for such a prohibition is obvious, for if one person was attempting to serve two circuits as official court reporter, it is easily foreseeable that his duties in connection therewith would conflict; whereas, as pointed out earlier herein, such situation could not arise in the instant case.

Although not mentioned by you in your inquiry, I feel it necessary in a determination of this question to consider the provisions of Title 41, Section 150, Code of Alabama 1940, which section provides as follows:

"Wherever the duties of more than one office, position, or employment shall be filled, performed or discharged by one officer or employee, such officer or employee shall only receive the salary named for the highest paid office, position or employment so filled, performed or discharged."

This statute was originally enacted at the Extra Session of the Legislature 1933 as a portion of Act No. 138, General Acts 1933, page 124. This act, known as the Lapsley-Lusk Bill, was enacted as an economy measure and provided for a reduction in salary for the major portion of the state officials, and included as an additional provision thereof the statute quoted above, now incorporated in the Code of Alabama 1940 as Title 41, Section 150.

A study of this act reveals that it dealt with permanent positions of employment only and makes no reference to, nor in my opinion has an application to, temporary employees of the nature of a special court reporter. The evil such provision attempts to remedy is the holding by one person of two or more permanent positions of employment with the state and receiving compensation for each of such offices, positions, or employment. Accordingly, it is my opinion that such statute has no application to the question here considered, and should work as no bar to an official court reporter, who serves as special court reporter of another circuit, receiving compensation for the services rendered as special reporter.

Section 265, supra, provides that a person serving as special court reporter shall receive the same compensation, and shall be paid in the same manner as official court reporters are paid. Act No. 591, General Acts 1943, page 596, provides that as a portion of their compensation official court reporters shall receive monthly warrants in the amount of \$50.00 drawn by the State Comptroller on the general funds of the state treasury. I am, therefore, of opinion that, if it be certified to you by the judge of the circuit served that such person has performed the duties of special court reporter for a certain period of time, you are authorized to draw your warrant in payment for such services, notwithstanding the fact that such person has already received a state warrant in part payment of the annual salary paid such person for services rendered as official court reporter of another judicial circuit.

Any holding to the contrary, in my opinion, would not work to the efficient administration of the circuit courts of the state. As pointed out herein, the judge of a judicial circuit is only authorized to appoint special court reporters under certain circumstances and conditions, usually of an emergency nature. At such times, normally, the most competent persons available are those official court reporters of other judicial circuits of the state, not then engaged in the discharge of their official duties within the circuit for which appointed. If any such person accepts appointment as special court reporter, and performs the duties thereof, it is my opinion that such person should receive the compensation provided by law. It is obvious that the expense to the state has not been increased in any way, and in all probability the administration of the affairs of the circuit court concerned have been materially benefited.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 27, 1947.

Hon. C. E. Corprew,
Sheriff, Tallapoosa County,
Dadeville, Alabama.

Motor Vehicles—Rules of the Road—Justices of the Peace—
Title 13, Section 416, Code of Alabama 1940.

Justices of the peace have no jurisdiction of offenses involving violations of the rules of the road outside of their respective beats or precincts, except as provided in Title 13, Section 416, Code of Alabama 1940.

If there is no justice of the peace in the precinct in which the offense was committed, or if the justice of the peace is disqualified or incompetent to act, then a justice of the peace in an adjoining beat or precinct has jurisdiction to try such offense.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of July 8, 1947, is as follows:

"I am asking you to give your opinion on the following question. Can a Justice of Peace try a man for driving while intoxicated if the crime was committed outside the jurisdiction or beat in which the Justice of Peace resides?"

In answering your inquiry, I call attention to Title 13, Section 416, Code of Alabama 1940, which is as follows:

"§ 416. Territorial jurisdiction of justices of the peace in criminal matters.—Justices of the peace and notaries public ex-officio justices of the peace shall have final jurisdiction in criminal cases as provided in the following section in the respective precincts for which they are elected or appointed, and shall have and exercise such jurisdiction as to all matters arising in adjoining precincts in which there is no justice of the peace or notary public ex-officio justice of the peace, or when the justice of the peace or notary public ex-officio justice of the peace is disqualified or incompetent to act; but they shall have jurisdiction as to all preliminary hearings coextensive with their counties except in the precincts in which or for which inferior courts have been established in lieu of justice of the peace, and the jurisdiction of justices of the peace conferred on such inferior courts."

Justices of the peace have no jurisdiction of traffic law violations outside of their precinct, except as is specifically provided in the above quoted section. Biennial Report of Attorney General, 1936-38, page 275.

If there is no justice of the peace in the precinct in which the offense was committed, or if the justice of the peace is disqualified or incompetent to act, then a justice of the peace in an adjoining beat or precinct has jurisdiction to try such offense.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 27, 1947.

Hon. D. L. Rosenau, Jr.,
Judge, Limestone County Court,
Athens, Alabama.
Courts—Sunday—

Holding court and performing other judicial acts on Sunday is prohibited in the State of Alabama.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of July 13, 1947, is as follows:

"I wish your official opinion about a matter that grew up as a wartime practice in this court and doubtless should be stopped, but I wish your advice and opinion before taking any action.

"As I understand the law, the ordinary legal holiday is nevertheless a judicial day, and court may be held on such days as on any other day, but Sunday, as I understand the law, is not a judicial day and court sessions are not proper on that day.

"During the war so many people were employed at nearby defense plants and were arrested here over the weekend that I started having Sunday sessions of the court, so as to allow these defense workers or military personnel to be back on the job Monday and assist in every way possible in the defense program. I felt that such was my duty from a patriotic viewpoint regardless of the law, and often remarked that if they changed their minds on Monday about a guilty plea on Sunday, to come back and I would be glad to set it aside and grant a new trial.

"A bad habit, or illegal habit, once started is difficult to stop, and with the war over, our criminal violations have continued to grow so that now we are having about three times the number arrested as

at this time last year, and from past habit and hearsay these defendants wish and expect to be allowed to plead guilty and pay their fines on Sunday, causing me as Judge and the sheriff and jailer to hold informal court sessions morning, afternoon and night all day Sunday. I am willing to do everything possible that is required on my job and to assist in law enforcement, but aside from the fact that this has become a Sunday nuisance, I feel that instead of helping to break up crime, it is encouraging it by allowing the prisoners to think that we give almost instantaneous "in again, out again" service and that if they were required to stay in until Monday morning (subject of course to the right of making bond), they might think more seriously about violating the law next time.

"Will you, therefore, kindly give me your opinion as to whether such informal Sunday sessions are legal, and whether in your opinion I should discontinue them?"

The Supreme Court of Alabama, in the case of *Matthews v. Ansley*, 31 Ala. 20, said:

"It is laid down in books of the highest authority, that, at common law, the Christian Sabbath was dies non juridicus; and that no judicial proceedings could be had on that day. It was declared with equal clearness, that acts purely ministerial might legally be performed on that day."

In 60 C. J., page 1143, section 102, it is said:

"In the absence of a permissive statute, a judge or magistrate has no authority to hold court or conduct a trial on Sunday. But even where a trial is conducted on Sunday, it has been held that the court does not thereby lose jurisdiction of the cause. Where a permissive statute exists, of course, the right to hold court is determined by the statute, and, such conduct being authorized, the trial and proceedings had with reference thereto are valid."

The common law is in force and effect in the State of Alabama where it has not been abrogated by statute. Title 1, Section 3, Code of Alabama 1940.

I think it may be safely said that judicial acts are prohibited on Sunday, but purely ministerial acts are valid. A formal hearing, an adjudication of guilt, the imposition of a fine and costs, are all judicial acts. There is no statute in Alabama authorizing such acts on Sunday.

Many ministerial acts, such as filing a complaint (Title 7, Section 346, Code of Alabama 1940); issuing an attachment (Title 7, Section 859, Code of Alabama 1940); the deliberation of a jury; the delivery and acceptance of a verdict (*Simmons v. State*, 129 Ala. 41, 29 So. 829); the discharge of

a jury (*Curry v. State*, 203 Ala. 239, 82 So. 489), may be performed on Sunday.

Answering your inquiry, it is my opinion that you cannot legally hold court on Sunday.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 27, 1947.

Hon. G. R. Dollar, Chairman,
Court of County Commissioners,
Winston County,
Double Springs, Alabama.

Counties—Courts of County Commissioners—Title 12, Section 26, Code of Alabama 1940—

The court of county commissioners is without authority to purchase the field notes of a surveyor covering the property in the county. Such field notes must be secured and paid for through the Secretary of State as provided in Title 12, Section 26, Code of Alabama 1940.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of June 24, 1947, is as follows:

"Section 26 of Title 12 of the 1940 Code of Alabama authorizes the court of county commissioners to contract with the secretary of State for certified copies of the field notes of the original government surveys of all lands in the county.

"A retiring registered surveyor in this county has copied his field notes in a well bound book and would like to sell them to this county. The Commissioners Court would like to purchase these notes so that they can be kept on file in the probate office for the use of anyone who might need them. Please advise me if this book of field notes can legally be purchased from him by th Court at a price not to exceed an amount that would be charged by the secretary of state."

Title 12, Section 26, Code of Alabama 1940 (the statute referred to in your inquiry) is as follows:

"§ 26. Copy of field notes.—The court of county commissioners is authorized to contract with the secretary of state, at an amount not greater than six and one half cents per hundred words, for certified copies of the field notes of the original government surveys of all lands in the county, to be made in a book of proper size, to be furnished by the court; and such book shall be deposited in the office of the judge of probate, free to inspection, and making of copies of said field notes by all citizens of the state; and when the same is completed and delivered to the judge of probate, the court of county commissioners must draw a warrant on the county treasurer for the amount due the secretary of state, which shall be a preferred claim against such county."

"Counties may exercise only such powers as are expressly delegated to them by the Legislature and such additional powers as may be necessary for the exercise of express powers where the Legislature has not specifically provided the mode or manner of exercising express powers." *Arledge v. Chilton County*, 237 Ala. 96; *Poyner v. Whiddon*, 234 Ala. 168; *Stone, ex rel. Towle vs. Stone, County Treasurer*, 236 Ala. 82.

"And so where the Legislature has expressly provided for the mode of exercising a power the county is limited to the mode so provided." *Quarterly Report of Attorney General*, Vol. 37, p. 63.

Under the provisions of Section 26, *supra*, the court of county commissioners is authorized to contract with the Secretary of State at a rate not greater than six and one-half cents per hundred words for certified copies of the field notes of the original government surveys of all the lands in the county, and when the same is completed and delivered to the judge of probate, the court of county commissioners is authorized to pay the amount due the Secretary of State for the same.

Section 26, *supra*, is the only authority for the court of county commissioners to secure and pay for the field notes under consideration, and it is limited to the method of securing and paying for the same as provided in said Section 26.

It is, therefore, my opinion that such field notes may not be purchased from the surveyor referred to in your inquiry, but must be secured and paid for as provided in Section 26, *supra*.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 27, 1947.

Dr. Thomas D. Hopkins, President,
Alabama State Board of Optometry,
104 Montgomery Street,
Montgomery 4, Alabama.

Optometrists—Title 46, Sections 208 and 210, Code of Alabama 1940.

1. A store or business establishment wherein eyes are examined and glasses fitted may be operated only when such store or business establishment, or optometric department shall be in charge of a duly licensed optometrist, whose name must appear on and in all optometry advertising of whatsoever nature done by said store or business establishment.

2. Title 46, Section 208, Code of Alabama 1940, granting exemptions to physicians, surgeons, and oculists from the provisions of Title 46, Chapter 2, Code of Alabama 1940, regulating the practice of optometry, cannot be extended to a store or business establishment wherein eyes are examined and glasses fitted.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of July 28, 1947, is as follows:

"For the efficient operation of this Board, your early official ruling on the following matter is respectfully requested.

"Many lay-organizations are now coming into existence in the field of Refraction, and seeking to by-pass the Optometry Law, by using retired physicians, Osteopaths, and even Chiropractors. The law requires Lay-organizations, operating an Optometry department to use the name of the Optometrist, 'in and all advertising done.'

"After passage of the new Code of Ethics by the Alabama Optometric Association, forbidding advertising by its members, the lay-organizations formerly operating Optometry Department are now turning to doctors in other fields as a means of avoiding the requirements of the Optometry Law, and whose qualification as Refractionist has not been attested to by an Official Board, but whose license, these Lay-organizations seek to use as a screen and thus avoid the letter of the Optometry Law, and which is not in the public interest.

"This Board contends that since the Optometry Law is the only one on the Statute Books regulating Refraction and, while Medical men are exempt as such, when operating under their own name: However, when he hires himself out, it does not appear that he could operate under Section 210 of Title 46, Chapter 11. Nor do we believe that a lay-organization could possibly qualify under this section without employing an Optometrist and also causing his name to appear in and on all advertising done, for the protection of the public, in whose interest the law was created."

In answer to your inquiry, your attention is called to Title 46, Sections 208 and 210, Code of Alabama 1940, which are as follows:

"§ 208. Chapter does not apply to physicians, oculists, etc.—Nothing in this chapter shall be construed as applying to physicians, surgeons or oculists authorized to practice under the laws of the State of Alabama."

"§ 210. Store where glasses are sold; how department conducted.—Nothing in this chapter shall be so construed as to prevent any person, firm, or corporation from owning or operating a store or business establishment wherein eyes are examined or glasses fitted; provided, that such store, establishment, or optometric department shall be in charge of a duly licensed optometrist, whose name must appear on and in all optometry advertising of whatsoever nature done by said person, firm or corporation."

In the case of *Hampton v. Brackins' Jewelry & Optical Company, Inc.*, 237 Ala. 212, 186 So. 173, the court made the following statement in reference to Section 210, *supra* (formerly Section 2893, Code of 1923):

"It is of course this provision of the law that authorized or permitted the corporation defendant to own and operate a store or business establishment, wherein the human eye might be examined and glasses fitted. But this permission was to be operative only when such 'store, establishment, or optometric department shall be in charge of a duly licensed optometrist, whose name must appear on and in all optometry advertising of whatsoever nature done by said person, firm or corporation.'"

It will be seen from Section 210, *supra*, and the *Hampton case*, *supra*, that eyes may be examined and glasses fitted in a store or business establishment "only when such 'store, establishment, or optometric department shall be in charge of a duly licensed optometrist, whose name must appear on and in all optometry advertising of whatsoever nature done by said person, firm or corporation.'"

It is therefore my conclusion that a store or business establishment wherein eyes are examined and glasses fitted may be operated only when

such store or business establishment or optometric department is in charge of a duly licensed optometrist "whose name must appear on and in all optometry advertising of whatsoever nature done" by said store, business establishment or optometric department.

It is my further conclusion that the exemptions granted to physicians, surgeons, and oculists by Section 208, supra, is a personal exemption of such physician, surgeon, or oculist from the provisions of Title 46, Chapter 2, Code of Alabama 1940, regulating the practice of optometry. This exemption cannot be extended to a store or business establishment wherein eyes are examined and glasses fitted.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

August 27, 1947.

Hon. J. H. Dobbins,
Clerk,
Circuit Court,
Calhoun County,
Anniston, Alabama.

Circuit Clerks—Clerks of courts of like jurisdiction—Appeals—Certificates of appeal—Transcript of the record—Title 15, Section 379, Code of Alabama 1940—Rule 43 and Rule 48 of Rules of Practice of the Supreme Court—Act No. 352, General Acts 1945, page 567.

Certificate of appeal in all criminal cases should be filed in Supreme Court or Court of Appeals within twenty days from the date of conviction where defendant gives notice of appeal.

Accurate transcript of the record should be filed immediately after the expiration of ninety days from the date of conviction, or date on which the trial judge overruled and denied motion for new trial.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion bearing date of March 28, 1947, is as follows:

"Please give me your opinion of the following:

"1945 Cumulative Pocket Part, Code of Alabama, Volume Two,
Page 67-68

"When a case is appealed from Circuit Court to the Court of Appeals under the above ruling 'such hearing and the Order thereon shall be concluded within ninety days from the date of the trial or the date of the ruling on a motion for new trial.'

"In one such case no motion for new trial having been filed; the ninety days from the date of trial having expired on March 14th and no testimony having been filed with me by the Court Reporter, should I send my Transcript of the record on down to the Appellate Court.

"An early opinion would be appreciated."

Answering your inquiry, I call your attention to Title 15, Section 379, Code of Alabama 1940, which is as follows:

"§ 379. Transcript on appeal; when made out and forwarded.—When the execution of the judgment has been suspended as provided in this article, or when an appeal is taken without such suspension, it is the duty of the clerk of the court in which the case was tried to make out a full and accurate transcript of the record, attach his certificate thereto, and transmit it to the clerk of the supreme court or the court of appeals, within twenty days thereafter; or within twenty days after the signing of the bill of exceptions; or if the bill is not signed and filed, such transcript must be made out and forwarded within twenty days after the expiration of the time allowed by law for the signing of the bill of exceptions."

Rule 43 of the Rules of Practice of the Supreme Court (Title 7, page 1020, Code of Alabama 1940) places the duty upon the clerk of the circuit court, or court of like jurisdiction, to file with the clerk of the Supreme Court or Court of Appeals a certificate of appeal within twenty days after a defendant has been adjudged guilty of a criminal offense and has given notice of appeal. Such certificate must recite the character of the offense for which the defendant was convicted and whether or not the sentence has been suspended pending the appeal. Under the law (Act No. 352, General Acts 1945, page 567), the transcript of the evidence, together with objections as to its correctness and the settling of such objections by the trial judge, must be had within ninety days from the date of conviction or the date on which the motion for a new trial was overruled and denied.

Rule 48 of the Rules of Practice of the Supreme Court of Alabama (Title 7, 1945 Cumulative Pocket Part, Page 89, Code of Alabama 1940) virtually extends the time for filing such transcript to six months. This rule further says that the transcript of the evidence must be filed within seventy days of the date of conviction or date on which the motion for a new trial was overruled and denied, and that each party has ten days in which to file objections to the correctness of the transcript and that the trial judge has ten days in which to hear the objections, settle and approve the transcript.

As you can see, the procedure governing appeals is a little confusing; however, it is my opinion that the procedure suggested below should be followed:

1. The clerks of the circuit courts, or courts of like jurisdiction, should file with the clerk of the Supreme Court or the Court of Appeals a certificate of appeal showing the name of the defendant, the offense for which he was convicted, the length of punishment, and whether or not the sentence was suspended pending appeal, within twenty days from the date of such conviction, in all cases where a defendant has been adjudged guilty of a criminal offense and has given notice of appeal.

2. At the expiration of ninety days from the date of conviction, or the date on which the trial judge overruled and denied the motion for a new trial, the clerk should make out a full and accurate transcript of the record, attach the certificate thereto, and transmit it to the clerk of the Supreme Court or the Court of Appeals.

3. If the defendant desires a transcript of the evidence had and taken during the trial of the cause, the procedure set forth in Act No. 352, General Acts 1945, page 567, the Rule 48 of Rules of Practice of the Supreme Court of Alabama, *supra*, should be followed.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 27, 1947.

Honorable J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Banks and Banking—Mortgages—Filing Tax—

Title 51, Sections 618 and 619, Code of Alabama 1940—Act No. 181, General Acts 1947, approved July 22, 1947.

A lease sale contract assigned before recordation to a state bank is not exempt from the filing tax levied under the provisions of Title 51, Section 619, Code of Alabama 1940, when such instrument is offered for record by the assignee bank. However, the assignment of such contract is not subject to said tax.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of August 18, 1947, is as follows:

"Please give me your opinion on the following: On August the 8, 1947, the Clayton Banking Company filed for record a Lease Sale Contract, the Board of Revenue of Barbour County being the Grantor and the Burford Toothaker Tractor Company being the Grantee. On or about the same date this agreement is dated which was prior to August the 8th said contract was assigned to the Clayton Banking Company by the Burford Toothaker Tractor Company. In other words, the contract was filed, in this office to be recorded, by the Clayton Banking Company and was never recorded until said contract was assigned to The Clayton Company. Since the Bill recently passed exempting all banks from Mortgage Tax the Clayton Banking Company was under the impression that there would be no Mortgage Tax on said Lease Sale Contract. What I want to know is whether or not I should charge The Clayton Banking Company a Mortgage Tax on this contract."

A mortgage, deed of trust, contract of conditional sale, or other instrument of like character made to a national bank to secure the payment of a debt due said bank is not subject to the filing tax levied under the provisions of Title 51, Section 619, Code of Alabama 1940. *Crosland v. Federal Land Bank*, 261 U. S. 374, 67 L. Ed. 703; *Pittman v. Home Owners' Loan Corporation*, 308 U. S. 21, 84 L. Ed. 16; Quarterly Report of Attorney General, Vol. 17, p. 218; Quarterly Report of Attorney General, Vol. 19, p. 291; Quarterly Report of Attorney General, Vol. 24, p. 12.

Before the passage of Act No. 181, General Acts 1947, approved July 22, 1947, state banks were subject to the mortgage filing tax levied under the provisions of Section 619, *supra*. Section 2 of Act No. 181, *supra*, is as follows:

"Section 2. No tax as levied by the state in the recording of mortgages of whatever kind filed for record in the Probate Court in any county in the state shall be levied upon or collected from any Bank in this State unless the said tax shall be applicable to and collected from all banks and banking institutions doing business in the State of Alabama."

Since national banks are exempt from the mortgage filing tax levied under the provisions of Section 619, *supra*, under the provisions of Section 2, *supra*, state banks are exempt from said tax.

In an opinion of this office found in Biennial Report of Attorney General, 1934-36, p. 632, it was held that a conditional sale contract as-

signed before recordation to a national bank was not exempt from the mortgage filing tax levied under the provisions of Section 348, Schedule 94, Revenue Act of 1935, General Acts 1935, p. 256 (Section 619, *supra*). See also Quarterly Report of Attorney General, Vol. 27, p. 59, in which a similar conclusion was reached in reference to the deed filing tax levied under the provisions of Title 51, Section 618, Code of Alabama 1940.

Answering your inquiry, in view of the above opinions, it is my opinion that the lease sale contract executed by the Board of Revenue of Barbour County to the Burford Toothaker Tractor Company and assigned by the Burford Toothaker Tractor Company to the Clayton Banking Company is subject to the mortgage filing tax levied under the provisions of Section 619, *supra*, when presented for record by the Clayton Banking Company.

While not necessary in answering your inquiry, I deem it advisable to call your attention to the fact that the assignment of the lease sale contract by the Burford Toothaker Tractor Company to the Clayton Banking Company is not subject to the mortgage filing tax levied under the provisions of Section 619, *supra*. Biennial Report of Attorney General, 1934-36, p. 632; Quarterly Report of Attorney General, Vol. 27, p. 59.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 27, 1947.

Hon. A. R. Brown,
County Engineer,
Chambers County,
LaFayette, Alabama.

County Engineers—Employment Contracts—Title 12, Sections 67-68, Code of Alabama 1940.

The court of county commissioners is authorized to enter into a contract for the employment of a county engineer, provided such contract does not exceed two years, and provided further that other provisions of Title 12, Section 67, Code of Alabama 1940, are complied with, if the person employed possesses the qualifications prescribed by Title 12, Section 68, Code of Alabama 1940.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of August 15, 1947, is as follows:

"Can the Court of County Commissioners enter into a contract for my services as County Engineer and if so for what period of time?"

The court of county commissioners can enter into a contract for the employment of a county engineer, provided such contract of employment does not exceed two years, and provided further that other provisions of Title 12, Section 67, Code of Alabama 1940, are fulfilled. This Code section referred to reads as follows:

"§67. Authorization to appoint and salary.—The court of county commissioners or like governing bodies of the several counties, shall be authorized to appoint a county engineer who shall engage in no other employment and the amount of whose salary shall be such sum, not exceeding four thousand dollars per annum, as may be fixed by the court of county commissioners, board of revenue, or other like governing body of the county, payable in equal monthly installments from the county road and highway funds of the county, so shown by county contracts made with county engineer and entered of record. No contract of employment or appointment to office of such engineer can exceed two years."

Consequently, you are advised that the court of county commissioners of your county may enter into a contract for your services as county engineer, for a period of not exceeding two years under the authority of said section, provided you possess the qualifications prescribed by Title 12, Section 68, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 27, 1947.

Hon. Y. K. Lewis, President,
Board of Revenue,
Marengo County,
Linden, Alabama.

Roads—Counties—Courts of County Commissioners—Title 23,
Sections 43 and 65, Code of Alabama 1940.

It is within the discretion of the Board of Revenue of Marengo County to construct and maintain a public road or to construct a private road to a privately owned radio station in the county.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of August 18, 1947, is as follows:

"There is a broadcasting station being erected in Marengo County which is privately owned. These parties have requested us to build and maintain a road from the main highway to the station.

"In your opinion, is it permissible for Marengo County to construct and maintain a road to this broadcasting station?"

"Please render a decision on this matter as early as possible."

In my opinion, it is within the discretion of your county governing body to construct and maintain a public road or construct a private road to the privately owned radio station in the county.

Title 23, Section 43, Code of Alabama 1940, provides as follows:

"§ 43. Powers of courts of county commissioners with regards to roads, bridges and ferries.—The courts of county commissioners, boards of revenue, or other like governing bodies of the several counties of this state have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial, and executive powers, except as limited in this chapter. Courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years."

Under the Section, *supra*, this office has held that county governing bodies are vested with broad powers with reference to public roads. *Quarterly Report of Attorney General*, Vol. 39, p. 34; *Quarterly Report of Attorney General*, Vol. 31, p. 54; *Biennial Report of Attorney General*, 1934-36, p. 160.

In the case of *Alabama Great Southern Railroad Co. v. Denton*, 239 Ala. 301, 195 So. 293, the Supreme Court said:

"The Court of County Commissioners is given general jurisdiction, with legislative, executive and judicial powers, over the matter of providing a system of county roads. * * * *

"When the question of the need for a public road is involved, the law commits this to the county authorities. * * * *

"* * * * * A primary consideration is whether there is now a public need for such road. * * * * *

In the case of *Commissioners' Court of Coffee County v. Ballard*, 185 Ala. 501, 64 So. 311, the Court said:

"* * * * * In proceedings to establish public or private roads the commissioners' courts are clothed with and exercise judicial, executive, and legislative power. * * * * *

Title 23, Section 65, Code of Alabama 1940, provides as follows:

"§ 65. Establishment of private roads.—Private roads may be established by the court of county commissioners or other governing body by whatever name called, on the application of any person, such roads not to exceed fifteen feet in width, and to be opened and kept in repair by the person on whose application they are established without exemption on public roads."

From the above, it is evident that if your governing body decides to construct a private road to the radio station, this road cannot exceed fifteen feet in width and should be kept in repair by the person who is petitioning for the establishment of the road.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 27, 1947.

Hon. R. P. McRee,
Assistant Administrator,
Alabama Alcoholic Beverage Control Board,
State of Alabama,
Montgomery 2, Alabama.

Intoxicating beverages—Title 29, Section 74 and Section 177, Code of Alabama 1940, as amended by Act No. 257, General Acts 1943, page 229.

1. A bakery that bakes, sell, and distributes fruitcakes is a manufacturing establishment within the meaning of Title 29, Section 74, Code of Alabama 1940, as amended by Act No. 257, General Acts 1943, p. 229.

2. One who qualifies to possess alcoholic beverages for the purposes mentioned in Title 29, Section 74, Code of Alabama 1940, as amended by Act No. 257, General Acts 1943, page 229, may have such beverages shipped to him by the Alabama Alcoholic Beverage Control Board, or may legally purchase same from any State operated store and transport same to their destination when the affidavit mentioned in Title 29, Section 177, Code of Alabama 1940, as amended by Act No. 257, General Acts 1943, page 229, is made and a copy of same attached to such beverages.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of July 25, 1947, is as follows:

"We have received numerous inquiries in this office with reference to Section 74, Code of Alabama 1940, as amended by the Alabama Legislature in regular session 1943.

"In order to answer the inquiries mentioned above, it will be appreciated if you will advise us as soon as possible on the following:

"1. Would a bakery that bakes, sells and distributes fruit cakes be classified as a manufacturing establishment under the provisions of Section 74, Code of Alabama 1940, as amended?

"2. In the event you hold that a bakery is a manufacturing establishment, we would also like to know whether or not the owner and operator of such bakery can purchase alcoholic beverages to be used in fruit cakes from our State stores and transport same in his own conveyance from such store to his plant, provided the affidavit required in Section 177, Title 29, Code of Alabama 1940, is attached to the container of the beverages purchased."

Two questions are posed in your inquiry, and I shall answer them in the order in which they appear.

I am of the opinion that your first inquiry should be answered in the affirmative.

The term "manufacturing" connotes a fashioning of raw material by means of labor and machinery into a product suitable for use in a different form.

"Manufacturing" is the production of articles for use from raw or prepared materials by giving these materials new forms, qualities, proportions or combinations, whether by hand labor or machine. The term has also been defined as to work raw or partly raw materials into suitable forms for use. *American Sumatra Tobacco Corporation v. Tone*, 127 Conn. 132, 15 A. 2d. 80.

A "baker" is a manufacturer. *State v. Amick*, 171 Md. 536, 189 A. 817.

A bakery is a "manufacturing plant" within the meaning of certain license statutes. *State v. Hennessy Co.*, 71 Mont. 301, 230 P. 64.

A "bakery" is any place used for the purpose of mixing, compounding, or baking for sale or for purposes of a restaurant, bakery or hotel, any bread, biscuit, pretzels, crackers, buns, rolls, macaroni, cake, pies, or any food products of which flour or meal is a principal ingredient. *Continental Baking Co. v. Campbell*, 176 Okla. 218, 55 P. 2d. 114.

Answering your second inquiry, it is my opinion that it must likewise be answered in the affirmative.

Title 29, Section 177, Code of Alabama 1940, as amended by Act No. 257, General Acts 1943, page 229, sets out the procedure to be followed in obtaining beverages for the non-beverage uses specified in Title 29, Section 74, Code of Alabama 1940, as amended by Act No. 257, General Acts 1943, page 229, and is as follows:

"§177. Affidavit of person desiring to have alcohol or wine shipped to him.—Any person desiring to have shipped to him under the laws of Alabama, alcohol, or wine for sacramental use, or for any non-beverage use specified in Section 74, of Title 29, shall make an affidavit before an officer in Alabama authorized to administer oaths, stating the quantity of such alcohol or such wine that the said party desires to receive; the use to which either the wine or the alcohol is to be put, and that the person seeking the shipment is authorized under the laws of Alabama to have, receive and possess such quantity of alcohol or wine as is shipped and that the shipment is sought of a legal quantity and for a bona fide legal purpose, permitted under the laws of Alabama, and for no other purpose, and a copy of said affidavit shall be pasted or permanently attached to the container of the alcohol or wine, when the same is shipped into the State of Alabama, and is received by said applicant from the carrier."

The emphasized portion of the above section states that the copy of the affidavit must be attached to the container when the same is shipped into the State of Alabama and is received by said applicant from the carrier.

I do not construe the emphasized portion of the above section to mean that one who qualifies under Title 29, Section 74, Code of Alabama 1940, as amended, *supra*, must have such beverages shipped to him from outside the State of Alabama. It would be an anomaly to hold that a person who qualifies under Title 29, Section 74, Code of Alabama 1940, as amended, *supra*, to obtain and possess beverages for the purposes therein specified could not obtain such beverages from the State main-

tained and operated stores here in Alabama. It is my opinion that such beverages may be ordered through the Alabama Alcoholic Beverage Control Board here in Montgomery and shipped to the persons mentioned in Title 29, Section 74, as amended, *supra*, or such persons can legally purchase such beverages from any State operated store after having made the affidavit required by law and transport such beverages with the affidavit attached to same to their destination.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 28, 1947.

Dr. D. G. Gill,
State Health Officer,
State Health Department,
CAPITOL.

County boards of health—Hospitals—Title 22, Section 8, Code of Alabama 1940, Act No. 211, General Acts 1945, page 330.

A county board of health does not have authority to establish, own, or operate hospitals, public health centers, and related facilities as an agent of the State Board of Health, or otherwise.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of April 30, 1947, is as follows:

"An opinion is requested of the Attorney General concerning the authority of County Boards of Health, as agents of the State Board of Health, to own and operate hospitals, public health centers, and related facilities.

"In answer to an inquiry from this Department as to the right of a County Board of Health to acquire or hold title to real estate, the Attorney General on February 21, 1941, wrote Dr. J. N. Baker, then State Health Officer, to the effect,

"The Board being a creature of the statutes, its powers and jurisdiction are not to be presumed, but must be found in the letter of the statute."

"Subsequent to that date, acts of the Legislature, contained in Title 22, Articles 4, Section 204 (4) 'Authority to construct and op-

erate public hospitals and health centers,' and Section 204 (10) 'Authority to acquire and dispose of property,' would seem to grant this authority."

The authority and jurisdiction of county boards of health is contained in Title 22, Section 8, Code of Alabama 1940. No authority is conferred by this section on county boards of health, as agents of the State Board of Health, or otherwise, to own and operate hospitals, public health centers and related facilities. The only power and authority the county boards of health possess is set forth in this section.

Act No. 211, General Acts 1945, page 330, authorizes the State Board of Health to construct and operate public hospitals and health centers, and also authorizes local governing bodies to establish hospital associations. The act does not expressly or impliedly confer authority upon county boards of health to establish, own and operate hospitals or health centers.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 29, 1947.

Hon. Floyd Forman, Chairman,
Board of Revenue, Macon County,
Tuskegee, Alabama.

Title 22, Section 189, Code of Alabama 1940—Constitution of Alabama 1901, Section 94, Right of county to contribute funds for the maintenance of a municipal hospital dedicated to joint use of county and municipality.

1. County Board of Revenue of Macon County may appropriate funds to the City of Tuskegee for the maintenance of a hospital established by the City of Tuskegee when said hospital is dedicated to joint use of county and city.

2. Where express statutory authority empowers either a county or a municipality to establish a hospital, a county may contribute funds to a municipal hospital to aid in the maintenance of such hospital where the hospital is dedicated to joint use and the same benefits accrue to the county and its citizens as if the hospital had been established solely by the county.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of July 18, 1947, is as follows:

"The City of Tuskegee is making arrangements for the building of a hospital to be operated by the City of Tuskegee, but will be open to all residents of Macon County. The hospital will provide accommodations for both white and colored patients and will be the only hospital available in Macon County for the treatment of white people. At present there are no such hospital facilities.

"The City of Tuskegee has requested the Macon County Board of Revenue to assist the maintenance of the hospital with a yearly appropriation of \$5,000.00. The County Board of Revenue is willing to do so provided that such appropriation on its part will be legal.

"Please advise us whether or not the County Board of Revenue of Macon County can appropriate funds out of the County treasury to be paid yearly to the City of Tuskegee for the purpose of maintaining a hospital by the City of Tuskegee for the benefit of the residents of Macon County as well as for the City of Tuskegee."

My answer is in the affirmative.

Counties may exercise only such powers as are expressly delegated to them by the legislature and such additional powers as may be necessary for the exercise of express powers where the legislature has not specifically provided the mode or manner of exercising express powers. *Arledge v. Chilton County*, 237 Ala. 96; *Poyner v. Whiddon*, 234 Ala. 168; *Stone, ex rel. Towle v. Stone, County Measurer*, 236 Ala. 82.

By Title 22, Section 189, Code of Alabama 1940, the legislature of this State has given counties the express power to establish hospitals. This code section reads as follows:

"§189. Municipal and county authorities may establish hospitals.—The corporate authorities of any town or city, and the court of county commissioners, or board of revenue, of any county may each establish within the town or city, or within the county, hospitals, temporary or permanent, for the reception of the sick or infirm, or of persons suspected of having infectious or contagious diseases, and may make all needful rules and regulations for the control and management thereof, and may confer by contract upon any institution for the instruction of students of medicine located in the city, town, or county in which such hospital is situated, upon such terms and for such number of years as they may determine, the right to select the visiting staff of physicians to such hospital for the col-

legiate course of each year and to hold clinics on the patients therein and have its students attend such clinics. The corporate authorities and the court of county commissioners, or board of revenue, may unite in the establishment of such hospitals, if deemed expedient, making them common for the use of the town or city and of the county, and in the making of rules and regulations for the control and management thereof, and shall jointly have the same powers and authority above conferred upon each."

In construing this section of the code, my conclusion is that, (1) the corporate authorities of any town or city may establish a municipal hospital, (2) the court of county commissioners or board of revenue of any county may establish a county hospital, or (3) the corporate authorities of a municipality and the governing body of a county may unite in the establishment of a hospital for joint use.

Since a county is therefore given express authority to establish a hospital for the use of its citizens, it is my opinion, in view of authorities hereinafter cited, that a county may contribute funds to a municipality to aid in maintaining a hospital, whereby the accomplishment of the same purpose results.

Both the municipality and the county are independent agencies of the state, and, as seen from the code section noted, each is authorized to establish a hospital for the use of its citizens.

You state in your request for an opinion that "the City of Tuskegee is making arrangements for the building of a hospital to be operated by the City of Tuskegee, but will be open to all residents of Macon County." Thus, it is apparent that although the hospital will be located within the City of Tuskegee and will be owned and operated by the municipality, yet all of the inhabitants of the county will be entitled to its privileges and benefits.

In the case of *State ex rel. Austin et al v. City of Mobile*, 28 So. 2d. 177, a most recent decision of the Alabama Supreme Court (December 12, 1946)—the question arose as to the authority of the City of Mobile to contribute funds to the State Department of Docks and Terminals (both agencies of the State) in aid of the expansion of the State docks. It was there urged that the City of Mobile could not lawfully participate in the expansion program by contributing funds because: (1) Constitution of Alabama 1901, Section 94, prohibits such payment, (2) there is no express statutory authority for such payment, and (3) although the City of Mobile could itself make improvements contemplated by the expansion program, it could not aid the State in so doing since title to the facilities and management thereof would vest in the State of Alabama. The Supreme Court held all of these contentions unsound. In so doing, it held in effect that the Constitution of Alabama 1901, Section 94, did not apply because of the public purpose involved and that payment was to a public and not a private corporation. Section 94 reads as follows:

"§94. The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

The court also held that there was express statutory authority for the City of Mobile to construct the improvements considered and that under such broad provisions of express statutory authority it had the right to contribute funds to another state agency authorized to accomplish the very same purpose.

Further, the court held that title and ownership of the property was not a controlling factor, but rather the benefit and advantages accruing to the city and its citizens.

The Supreme Court, in reaching this decision, laid particular stress upon its former decision in *Carey v. City of Haleyville*, 230 Ala. 401, 161 So. 496, 497. This case involved donations by the city to the county board of education for the erection and maintenance of a school building. The court in this instance commented as follows:

"In the case of *Carey v. City of Haleyville*, 230 Ala. 401, 161 So. 496, 497, suit was brought to enjoin the city and its governing officials from issuing general obligation bonds and paying the proceeds to the County Board of Education to defray a part of the cost of constructing a school building located in the city. The complainant in that case made the same objections that are being made by the appellant in this case, that is that the building would be owned by the county board and that the control of the school building would not be lodged with the city. This court, among other things, said:

"As to these broad provisions for the erection of public school-houses, no question of taxation is attached thereto, as is the case under Section 2314, Code, nor is there any indication that the matter of title to the project was of any controlling importance. * *

"True, the municipality may not have title to the school building, and it may be under the control of the county board (Gen. Acts, Ex. Sess. 1933, p. 81, amending School Code 1927, §132), and the affairs of the school be under like control. School Code 1927, section 86. But considerations of this character would deny to the municipal corporation the power to donate any funds to the betterment of the schools located therein, as its public schools, by reason of the population limitation of 2,500, are under the supervision of the county board. Yet the inhabitants of Haleyville receive the benefit and enjoy the privileges of these schools in their midst; and the mere fact that another and independent agency of the state controls their

affairs is no reason for a denial of the right of the citizens through their municipal authorities lending aid in support of such institutions.

* * * * *

"No sound reason appears why such municipalities may not devote surplus proceeds of revenue for the erection or maintenance of such schools located within their corporate limits. The inhabitants receive the benefits, though along with others in territory surrounding."

See also *First National Bank of Birmingham v. Walker County Board of Education*, 243 Ala. 576, 11 So. 2d. 297, 299; *State ex rel. Radcliff v. City of Mobile*, 299 Ala. 93, 155 So. 872, 876.

By its holding in the *Carey v. City of Haleyville* case, *supra*, the Supreme Court thus held that the city might donate funds to the county board of education for the erection and maintenance of a school building for joint use. I see no reason, on basic principles, why the converse should not be true, i.e., that Macon County should be legally authorized to contribute funds to the City of Tuskegee for the purpose of aiding maintenance costs of a hospital dedicated to joint use for the citizens of the county and city.

In the case of *Smith v. Franklin County et al*, 221 Ala. 136, 127 So. 904, the Supreme Court upheld the right of the county to contribute funds to the City of Russellville in the paving of streets adjacent to the county courthouse. It is true that in that case a statute allowed the city to contribute funds to the county for street improvements. However, the dictum of the case I deem important and quote in part:

"* * This provision, now a part of Section 2252 of the Code, would afford an example of strange anomaly in the enactment of law if it should be held that a city or town may contribute to the improvement of a street by a county, but that a county may not contribute to the improvement of a street by the town or city wherein it is located. * *"

To my mind, under the recognized principles laid down by our Supreme Court in the *Carey v. Haleyville* case, *supra*, it would have likewise been a strange anomaly to have held that under converse conditions the county could not have contributed funds to the City of Haleyville had the City erected the school building instead of Winston County.

All authorities considered, it is therefore my opinion that the County Board of Revenue of Macon County can appropriate funds out of the county treasury to the City of Tuskegee for the purpose of maintaining a

hospital by the City of Tuskegee for the benefit of the citizens of Macon County as well as the citizens of the City of Tuskegee, and you are so advised.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 29, 1947.

Hon. J. A. Hill,
Sheriff, Clarke County,
Grove Hill, Alabama.

Sheriffs—Costs—Fine and Forfeiture Fund—Title 11, Section 83, Code of Alabama 1940—Title 11, Section 100, Code of Alabama 1940.

Sheriffs receive the costs to which they are entitled in prosecution arising under Title 14, Section 437, Code of Alabama 1940, as in other misdemeanor cases.

Sheriffs entitled to guard allowance each time prisoner is lawfully committed to jail.

Sheriffs not entitled to guard fee in a prosecution based upon an affidavit and warrant charging a misdemeanor where defendant is acquitted, or the case is nol prossed or abated by death.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for official opinion, bearing date of June 24, 1947, is as follows:

"I am a newly elected sheriff and am desirous of charging the correct fees and would appreciate your help by an official opinion on the following.

"In county court when a defendant is charged with non-support and his case is Nolle Prossed or discharged, can the Sheriff's cost be charged to the County Fine and Forfeiture Fund?

"When a defendant arrested for a felony, committed to jail on Justice of Peace Warrant and several days later taken before the Justice for a preliminary trial which results in the defendant being bound over to Grand Jury and is taken back to jail, can an additional guard fee be charged in case defendant is convicted under Title 45,

Section 69 of the Code of 1940? In the event of acquittal, can said guard fee be charged against the County Fine and Forfeiture Fund?"

Two questions are posed in your inquiry, and I shall answer them in the order in which they appear. Title 14, Section 437, Subdivision 8, Code of Alabama 1940, is the section under which one may be prosecuted for non-support, and is as follows:

"(8) Any able-bodied person who shall abandon his wife and children, or either of them without just cause, leaving her or them without sufficient means of subsistence, or in danger of becoming a public charge."

This is a prosecution for vagrancy and is a misdemeanor. The sheriff's costs attach to this offense the same as they do in all other misdemeanor cases, and are payable as all sheriffs' costs in other misdemeanor cases. Cf. Biennial Report of Attorney General, 1934-36, page 655. The sheriff's costs in such cases are payable as provided in Title 11, Section 83, Code of Alabama 1940.

Answering your second inquiry, I call your attention to Title 11, Section 100, Code of Alabama 1940, which has to do with the guard fees of sheriffs and provides, in pertinent part, as follows:

"For guarding each prisoner lawfully committed to jail in the following cases:

"In all felony cases whether convicted or not.....	\$2.00
In all arrests under indictment whether convicted or not.....	2.00
In all other cases where convictions follow arrests.....	2.00"

The sheriff is entitled to guard allowance each time a prisoner is lawfully committed to jail, except that in the last instance mentioned in Title 11, Section 100, Code of Alabama 1940, a conviction must follow such arrest before any guard fee attaches. Quarterly Report of Attorney General, Vol. 29, page 13. In the instant case, the defendant having been charged with a felony and having twice been lawfully committed to jail, you would be entitled to two guard allowances. Cf. Quarterly Report of Attorney General, Vol. 18, pages 84 and 86.

However, an additional guard fee is not provided for in Title 45, Section 69, Code of Alabama 1940. This section deals only with the items of cost that may be paid by the Department of Corrections and Institutions, and under Title 45, Section 70, is limited to \$250.00 in any one case. Title 45, Section 69, supra, merely sets forth, item by item, the costs attaching during the trial of the case that may be paid by the Department of Corrections and Institutions.

In the last sentence of your request, you ask, "In the event of acquittal, can said guard fee be charged against the County Fine and

Forfeiture Fund?" This question must be answered in the affirmative. Quarterly Report of Attorney General, Vol. 29, page 13, *supra*.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 29, 1947.

Hon. C. E. Rentz,
Circuit Clerk,
Marengo County,
Linden, Alabama.

County Courts—Appeals—Costs and Fees—Clerks of Circuit Courts—Sheriffs—Pardon, Parole and Probation—Preliminary Hearings—Fine and Forfeiture Fund—Department of Corrections & Institutions—Court Reporters—Title 11, Sections 83 (b)(d)(e), 87, 90, Code of Alabama 1940—Title 13, Section 326, Code of Alabama 1940—Title 42, Section 20, Code of Alabama 1940, as amended by Act No. 426, General Acts 1945, p. 666—Title 42, Section 25, Code of Alabama 1940, as amended by Act No. 426, *supra*—Title 45, Section 69, Code of Alabama 1940, as amended by Act No. 57, General Acts 1945, p. 58—Act No. 249, General Acts 1943, p. 217.

1. In a trial in a county court, the defendant is not entitled to a jury. However, on conviction, the defendant may appeal to the circuit court and there demand a jury trial.

2. In an appeal from a county court to the circuit court from a conviction for a misdemeanor, if the State fails to convict, the fees of the sheriff and clerk accruing in the county court are payable from the fine and forfeiture fund of the county.

3. In an appeal from a conviction of a misdemeanor in a county court to the circuit court, if the defendant is convicted and sentenced to hard labor, the items of cost accruing in the county court as well as those items of cost accruing in the circuit court may be paid by the State from the convict fund, as provided in Title 45, Section 69, Code of Alabama 1940, as amended by Act No. 57, General Acts 1945, p. 58. Such items of cost as are not payable by the State may be paid from the fine and forfeiture fund of the county.

4. While only such items of cost as are enumerated in Section 69, *supra*, may be paid by the State, the items of cost of the committing magistrate and constable, both together not exceeding \$5.00, as provided in Section 69, *supra*, may consist of

any legal fees chargeable by the committing magistrate and constable on a preliminary hearing, whether or not the same are specifically enumerated in said Section 69.

5. The only fee to which the clerk is entitled in probation cases is the fee of \$1.00, as provided by Title 42, Section 25, Code of Alabama 1940, as amended by Act No. 426, General Acts 1945, p. 666, which fee is payable in all probation cases.

6. The \$10.00 fee allowed the clerk for including the transcript of evidence in the record on appeal, under the provisions of Section 2, Act No. 352, General Acts 1945, p. 567, is not a proper charge on a cost bill to the State, but is payable from the fine and forfeiture fund of the county.

7. The fees of the court reporter for preparing the transcript of the evidence on appeal provided for in Section 3 of Act No. 352, *supra*, is not a part of the costs in the case, and, therefore, cannot be taxed as such.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of May 13, 1947, is as follows:

"Having been recently elected to the office of Circuit Clerk and finding that I am receiving conflicting advice regarding some of the duties of the office I would be very grateful for your help in clarifying some matters by an official opinion from you on the following.

"In County Court when a defendant charged with a misdemeanor appears and through counsel demands a trial by jury, does not the case go on the Grand Jury Docket. In the event the Grand Jury fails to indict, or in Court the state fails, can the Clerk and Sheriff collect their costs accrued in County Court from the County Fine and Forfeiture Fund. If the defendant is sentenced to Hard Labor will the state pay this County Court costs as provided for preliminary trials under Title 45, Section 69.

"In preparing a cost bill in felony cases under preliminary trial as provided by Title 45, Section 69, can all of the preliminary costs, such as 25¢ for complaint, 25¢ for mittimus and other preliminary costs not specifically set forth in Section 69, *supra*, as long as the total does not exceed \$5.00.

"Title 11, Section 90, provides for a \$2.00 probation fee in cases certified from an inferior court. Is the Circuit Clerk entitled to this

fee or any other fee in probation cases not certified from an inferior court.

"After the Court Reporter prepares an appeal case and turns the papers over to the Clerk to certify to the Supreme Court is the fee of ten dollars together with the 15¢ per hundred a proper charge on a cost bill to the State on conviction. If the State fails is this item payable from the County Fine and Forfeiture Fund."

In answer to your first inquiry, your attention is called to Title 13, Section 326, Code of Alabama 1940, which section is as follows:

"§ 326. Trial and proceedings in county courts; mode of appeal.— All trials or prosecutions instituted in all such county courts shall be begun upon affidavit and warrant as provided in this chapter and shall be tried by the judge of such court without a jury, and the judge shall determine both the law and the facts, and in cases of conviction the defendant shall have the right to appeal to the circuit court, and a jury trial may there be had on demand of the defendant as prescribed by law."

It will be seen from the above quoted section that in a trial or prosecution instituted in the county court, the defendant is not entitled to a jury, both the questions of law and the questions of fact to be determined by the judge. It will also be seen from said section that on conviction the defendant may appeal to the circuit court and there demand a jury trial.

It will thus be seen that in a trial for a misdemeanor in a county court, the case must be tried by the judge and a jury may be had only on appeal to the circuit court. Therefore, such a case does not go on the grand jury docket.

Title 11, Section 87, Code of Alabama 1940, providing for fees in county courts, is in part as follows:

"The sheriff shall receive the same fees as are allowed by law to him for similar services performed in the circuit court, including guard fees where defendants are confined in jail. The clerks of the circuit court who by law shall be made ex-officio clerks of the county court shall receive the same fees as are now allowed by law for similar services performed in the circuit court. * * * * * The fees above specified shall be taxed against the defendant on conviction or against the prosecutor under the provision of section 345 of title 13, and if not paid presently, may be collected by execution. * * * * * The fees of witnesses, clerks and sheriffs in all cases where no conviction is had shall be governed by the provisions of law applying to similar services in the circuit court or in preliminary proceedings."

If the defendant appeals to the circuit court from a conviction for a misdemeanor in the county court, as provided in Section 326, *supra*, and

"the State fails to convict" the fees of the sheriff and clerk accruing in the county court are payable from the fine and forfeiture fund of the county, under the provisions of Title 11, Section 83(b), Code of Alabama 1940, which is as follows:

"(b) In all trials in the circuit court, or county court, or court of like jurisdiction—except justice of peace court and courts in lieu of justice of peace courts whose jurisdiction in criminal cases is limited to the jurisdiction of justice of peace courts, where the state fails to convict, or the indictment abates or is nolle prossed or withdrawn and filed, the fees of the sheriffs and clerks of the court and the state's witnesses shall be paid out of the fine and forfeiture fund, but the sheriffs and clerks must make affidavit before the judge of the court in which the case is tried of the amount due them;"

In an opinion of this office found in Biennial Report of Attorney General, 1926-28, page 412, it was held that when a person is convicted of a misdemeanor in the county court, takes an appeal to the circuit court, and is there convicted, the costs accruing in the county court are properly included in the judgment against him for costs. This opinion further held that if a defendant fails to pay the costs so taxed against him and is sentenced to hard labor for such costs, the items of cost accruing in the county court as well as those items of cost accruing in the circuit court on appeal may be paid from the convict fund under the provisions of Section 3667, Code of Alabama 1923 (Title 45, Section 69, Code of Alabama 1940, as amended by Act No. 57, General Acts 1945, page 58).

However, only such items of cost as are enumerated in Section 69, supra, may be paid from the convict fund. Biennial Report of Attorney General, 1920-22, page 348; Biennial Report of Attorney General, 1932-34, page 165.

The amount payable by the State in any one case is subject to the limitation of \$250.00 as provided in Title 45, Section 70, Code of Alabama 1940.

Under the provisions of Title 11, Section 83(e), Code of Alabama 1940, all fees of the sheriff and clerk not paid by the State may be paid from the fine and forfeiture fund of the county. Quarterly Report of Attorney General, Vol. 8, page 260. Cf. Quarterly Report of Attorney General, Vol. 35, pages 55, 106.

From the above conclusions, it will be seen that the payment of costs accruing on preliminary trials need not be considered.

Answering your next inquiry in reference to the costs on preliminary trial paid by the State under the provisions of Section 69, supra, your attention is called to the following provision of said Section 69:

"Whenever a defendant is convicted, and sentenced to the penitentiary the following items of costs in the case shall be paid out of the convict fund, to the extent and in the manner hereinafter prescribed, to-wit: * * * * * cost of committing magistrate and constables on preliminary trial, * * * * * both together not to exceed five dollars; * * *"

While, as stated above, only such items of cost as are enumerated in said Section 69, supra, may be paid by the State, it is my opinion that the items of cost of the committing magistrate or constable, both together not exceeding five dollars, as provided in Section 69, supra, may consist of any legal fees chargeable by the committing magistrate and constable on a preliminary trial, whether or not the same are specifically enumerated in said Section 69.

I will next consider your inquiry in reference to the fee of the circuit clerk in probation cases.

Title 11, Section 90, Code of Alabama 1940 (the section referred to in your inquiry), was originally the last sentence of Section 2, Act No. 278, General Acts 1939, page 434, and was not a separate enactment. Section 2 of Act No. 278 was brought forward in its entirety (including the last sentence thereof) into the Code of Alabama of 1940 as Title 42, Section 20. Section 20 was amended by Act No. 426, General Acts 1945, page 666. By said amendment, the last sentence in Section 20, dealing with the fees of clerks in probation cases was deleted. It is my conclusion that such amendment, in effect, repealed Section 90, supra. This conclusion is strengthened by the fact that Act No. 426, supra, also amended Title 42, Section 25, Code of Alabama 1940, to specifically provide for the fees of clerks in probation cases. This section, as amended, is in part as follows:

"The Clerk of the Court, in addition to the usual fees now allowed him by law in criminal cases shall be allowed a fee of one dollar in each case for his services in keeping a probation docket and one dollar for forwarding the probation file in duplicate to the Board of Pardons and Paroles, all of which fees if not paid by the probationer shall be payable out of the funds of the State Department of Corrections and Institutions as other such court costs are now paid."

Section 2 of Act No. 426, supra, amended Title 42, Section 21, Code of Alabama 1940, to provide a method of appeal in probation cases to the Court of Appeals of Alabama. Under the procedure outlined in said section, as amended, the clerk was required to forward the probation file to the Board of Pardons and Paroles at Montgomery. This section was declared unconstitutional in the case of *In Re Upshaw*, 247 Ala. 221, 23 So. 2d 861.

It follows that since Section 2 was declared unconstitutional, it is not now the duty of the clerk to forward the probation file to the Par-

don and Parole Board; therefore, he cannot claim the fee of \$1.00 for this service, as provided in Section 25, supra.

In view of the fact that Title 11, Section 90, Code of Alabama 1940, providing for a fee of \$2.00 for clerks in probation cases, was repealed by Act No. 426, supra, it is my opinion that the only fee that a clerk is now entitled to in a probation case is the fee of \$1.00, as provided by Section 25, supra, for keeping the probation docket, which fee is payable in all probation cases. This fee, if not paid by the probationer, is payable out of the funds of the State Department of Corrections and Institutions.

In view of the above conclusions, the opinion found in Quarterly Report of Attorney General, Vol. 36, page 59, is no longer applicable.

I will next consider the question presented by your last inquiry.

The \$10.00 fee allowed the clerk for including the transcript of the evidence in the record on appeal, under the provisions of Section 2, Act No. 352, General Acts 1945, p. 567, is not a proper charge on a cost bill to the State, but is payable from the fine and forfeiture fund under the provisions of Title 11, Section 83(d)(e), Code of Alabama 1940. Quarterly Report of Attorney General, Vol. 46, p. 5. It is obvious that if the State fails to convict, the question of the payment of the fees would not arise.

The fee of the court reporter for preparing the transcript of the evidence on appeal, provided for in Section 3 of Act No. 352, supra, is not a part of the costs in the case, and, therefore, cannot be taxed as such. The court reporter is not required to prepare such transcript unless payment is made in advance, or security for payment is assured to him. Quarterly Report of Attorney General, Vol. 46, p. 5.

It might be added that, in automatic appeal cases, the fee of the court reporter for preparing the transcript is paid by the State under the provisions of Section 12, Act No. 249, General Acts 1943, p. 217.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 5, 1947.

Mrs. Ida V. Moffett, President,
Board of Nurses' Examiners and Registration,
1020 Woodward Building,
Birmingham 3, Alabama.

Nurses—Practical Nurses—Licenses—Act No. 292, General Acts 1945, p. 482.

1. Applications for licensure under the provisions of Section 10 of Act No. 292, General Acts 1945, p. 482, must be filed substantially completed on or before June 1, 1947, but such applications may be amended after June 1, 1947, by the supplying of references.

2. Applications for licensure filed under the provisions of Section 10 of Act No. 292, General Acts 1945, p. 482, must be filed between July 9, 1945, and June 1, 1947. There is no obligation on the Board to secure references, but such duty is upon the applicant. The Board is not prohibited, however, from securing references.

3. The Board may allow a reasonable time after June 1, 1947, for the completion or amendment of applications, and fees for licenses may be paid immediately preceding the issuance thereof.

Opinion by Assistant Attorney General Sykes.

Dear Mrs. Moffett:

Your request for an official opinion, bearing date of June 30, 1947, is as follows:

"The Board of Nurses' Examiners and Registration for the State of Alabama respectfully requests that you advise them of the proper action to be taken in concluding the licensing of practical nurses by waiver under section 10 page 15 of the enclosed booklet of the Act of the Alabama legislature providing for the licensing of practical nurses.

"The specific circumstances are as these: The Board has adopted an application procedure whereby the applicant fills out and sends in a form (the green form enclosed herein) and references are then requested from the Board office, from two employers and two physicians being shown on the form filed by the applicant. The green form together with the references has been considered the complete application, and no credentials which did not consist of these four completed forms verifying length and quality of nursing practice have been evaluated.

"On the date on which application for licensing by waiver ends, June 1, 1947, there are in this office (1) incomplete applications consisting only of the green form, and (2) incomplete applications consisting of the green form and one or more, but not all of the references.

"Will you please answer the following questions:

"1. Shall the 'application for licensure' be construed as meaning the completed application (including references), thereby ending consideration of all applications not completed on June 1st?

"2. Shall the 'application for licensure' be construed as meaning the form sent in by the applicant? If so, shall this office attempt to secure references from only those whose green forms were received on and immediately preceding June 1st (and if so for what previous period), or shall this office make another attempt to secure references from persons whose green forms were received as far back as November 1945?

"3. If an additional time shall be allowed for completing one or both of the above groups, when shall this period (for completion of references and payment of fees) end?"

The Act of the Alabama Legislature referred to in your inquiry is Act No. 292, General Acts 1945, p. 482, approved July 9, 1945. This Act provides for the examination, licensing, and regulation of practical nurses. Under the provisions of the Act, and after the Act became effective on July 9, 1945, the Board of Nurses' Examiners and Registration is authorized to examine, license, and regulate those persons desiring to practice the occupation of practical nurses. In Section 10 of the Act, a method is prescribed whereby those persons who have had three or more years of practical nursing experience prior to June 1, 1947, may obtain a license without examination. Your inquiry concerns this class of applicants. Section 10 of the Act, *supra*, provides as follows:

"Section 10. Persons 18 years of age or over now practicing as undergraduate nurses, practical nurses, attendants, or performing similar services under any other title may make application for licensure as a licensed practical nurse under this provision on or before June 1, 1947. The above application shall be made on forms furnished by the Board, in the manner prescribed by the Board, and verified by oath. The Board may issue a license to practice as a Licensed Practical Nurse to the person found to have had three or more years experience in the care of the sick prior to June 1, 1947, to be a citizen of the United States, of good moral character. The applicant must be endorsed by two physicians licensed in Alabama who have personal knowledge of the applicant's qualifications, and by two persons who have employed the applicant. The fee for each such license shall be five dollars (\$5.00)."

The procedure for licensing under this section is described in your inquiry as "licensing by waiver."

Answering your specific inquiries, therefore, you are advised:

1. The application for licensure should be construed as meaning a substantially completed application which is filed on or after July 9, 1945, the effective date of the Act, and not later than June 1, 1947. It is further my opinion that if the application filed by the applicant during this time does not list the references required, those references may be supplied at any time within the discretion of the Board. For example, if an application is filed under the provisions of Section 10 between July 9, 1945, and June 1, 1947, and it is otherwise complete but contains the name of only one physician, I believe that the application could properly be amended after June 1, 1947, by inserting the name of a physician. Section 10 requires that the application of the applicant which you refer to as the "green form" be filed by a certain date, June 1, 1947, therefore, it is absolutely necessary that the applicant have the "green form" filed by that date. Details such as the names of physicians who are references and names of employers who are references may, if the names are not included in the original application, be supplied at a later date. The Board, therefore, may use its discretion in deciding whether or not an application is substantially completed when filed on or before June 1, 1947. I find no objection to the Board's allowing minor changes in the application or the supplying of omissions.

2. In my judgment, and in answer to your second question, the application for licensure should be considered as meaning the form sent in by the applicant referred to in your inquiry as the "green form." As stated in answer to your question 1, the application for licensing under the provisions of Section 10 of the Act, *supra*, may properly be filed at any time from and including July 9, 1945, to and including June 1, 1947. The Board should, therefore, not limit its consideration merely to those applications filed immediately preceding June 1, 1947, but should consider all applications filed during the life of the Act and up to and including June 1, 1947.

I find that there is no obligation on the Board to secure references; that is to say, if the application is incomplete, it is the duty of the applicant to supply the references and not the duty of the Board to solicit such references. There is nothing, however, to prevent the Board from informing the applicant that her application is incomplete, and that references should be furnished. It is only in this way that the Board could obtain the names and addresses of physicians and employers who must certify to the applicant's qualifications. If a "green form" or application was filed as early as November, 1945, and the application has omitted names of references, there is no reason why the Board cannot request the applicant to submit references as an amendment to the application. There is no obligation on the Board, however, to do so.

3. Since the answers to questions 1 and 2 indicate that additional time should be allowed for completing or amending applications, when the application itself has been filed on or before the 1st day of June, 1947, you are advised that there is no specific time limit during which amendments may be made or omissions supplied to the original application. I believe that it would be proper for the Board to set a time which would be long enough for applicants to amend or supply omissions in their applications. This time should be a reasonable time depending on the number of applications involved and the number of omissions or amendments required.

The Board may collect a fee of \$5.00 as required by Section 10 of the Act, supra, for issuing the license immediately prior to the issuance thereof.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 10, 1947.

Hon. Harry T. Pillans,
Director of Personnel,
The Personnel Board for Mobile County,
P. O. Box 447,
Mobile 3, Alabama.

Mobile County—Municipalities—Firemen

A city fireman injured while playing or practicing baseball during a temporary cessation of work, when such recreation is fostered and encouraged by the employer, is injured within the purview of the phrase "while performing the duties of his office" as used in Rule 2.7 of the Rules of the Personnel Board of Mobile County. Such an injury occurring while off duty does not come within the meaning of said phrase.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of May 30, 1947, is as follows:

"Rule 2.7 of the Rules of the Personnel Board for Mobile County provides that an employee who is injured while performing the duties of his position, without fault or negligence on his part, shall be allowed such leave with pay as the Board deems proper.

"For the past several years the Police Department and the Fire Department of the City of Mobile have had a baseball team representing the respective departments. The Board of Commissioners of the City of Mobile have given every encouragement to this movement as it improves the physical condition of a number of men in the departments and builds up the morale of the departments. In addition to this, the funds from such events are used for certain relief measures in the departments and to purchase uniforms for the men. In the Fire Department, where men are on duty twenty-four hours and off duty twenty-four hours, it is necessary that some of the men who are on duty be called for the regular practice hours. A piece of fire apparatus is kept at the practice field so that, in the event of a fire, men are called from the practice field to the fire without any loss of time.

"On May 15, 1947, a member of the Fire Department who was on duty at the time and who was engaged in a practice session for the annual baseball game, was injured while sliding into third base. His injuries were such as to prevent his performance of his duties for sometime thereafter.

"Will you please advise me whether or not a fireman who has been injured while sliding into third base under these circumstances may have been injured while performing the duties of his position so as to entitle him to receive pay during the period of his convalescence, under the provisions of rule 2.7. In your opinion, will you please indicate whether the fact that the employee was actually on duty at the time has any bearing on the matter."

Under the facts stated, it is my opinion that your inquiry should be answered in the affirmative.

The question you present involves an interpretation of the phrase "while performing the duties of his position" as applied to the facts in the instant case. This phrase, in my judgment, is analogous to those used in various Workmen's Compensation Laws to the effect "arising out of and in the course of employment." Due to the lack of authority concerning the specific rule under consideration, it is deemed expedient to base my opinion on analogous reasoning in connection with the judicial interpretations of the Workmen's Compensation Laws in general.

In 71 Corpus Jur. p. 676—Workmen's Compensation Acts—Sec. 423 (4), the following general rule appears:

"§ 423 (4). Recreation of Employees—(a) In General. Where an employee is injured while at recreation during a temporary cessation of work, the injury is compensable as arising out of and in the course of employment where the recreation indulged in was fostered and encouraged by the employer to the end of efficiency of their service, but where the employer, although knowing of it and

not objecting, did not foster or encourage it, the injury does not arise out of or in the course of the employment."

The above rule, in my judgment, is applicable to the facts in the case at bar. Although the playing or practicing of base ball may not be a prescribed duty of the Mobile City Firemen, yet such is a recreation fostered and encouraged by the employer to the end of efficiency of their service. The fireman in question was injured during a temporary cessation of work while on duty at a time of regular working hours. He was at that time subject to and available for actual participation in the real duties for which he was employed.

You request that it be indicated whether the fact that the employee was actually on duty has any bearing on the matter. In my judgment, it does. If the injury in question had occurred to a fireman while off duty, such would not come within the purview of the phrase "while performing the duties of his office." Generally, where the accident occurs before the hour of labor has arrived or after the day's work is over, it does not arise "out of and in the course of the employment." However, the employment is not limited to the exact moment when the employee begins or quits work, the rule being subject to the exception that the employment may include a reasonable time before or after while the employee is at or near his place of employment. 71 Corpus Jur. 693—Workmen's Compensation Acts, Section 436 (1); Hayes v. Alabama By-Products Corporation, 242 Ala. 148, 5 So. 2d 624. This phase of your inquiry, in my opinion, comes within the general rule rather than the exception.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 10, 1947.

Hon. A. F. Head,

Tax Assessor,

Dale County,

Ozark, Alabama.

Taxation—Exemptions—Municipalities—Counties. Constitu-
tion of Alabama 1901, Section 91.

Property of a county and municipal corporation is exempt from ad valorem taxation, even though such property is leased by the county and city for profit.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion bearing date of May 26, 1947, is as follows:

"About the time of our entry into World War II, Houston County and the City of Dothan, jointly, purchased a large body of land near Grimes and this later became the site for Napier Field, being leased jointly by Houston County and the City of Dothan to the United States War Department. This body of land lies entirely within Dale County, no part of it being in Houston County or the City of Dothan.

"After it was acquired by Houston County and the City of Dothan and leased to the War Department for use as an army establishment, it was no longer subject to taxation by Dale County. However, with the war over, Napier Field has been entirely deactivated, declared surplus and turned back to the original purchasers.

"Considerable of this land has been sold off to individual purchasers for private uses and has been restored to Dale County's tax rolls. But considerable of it still remains in the hands of Houston County and the City of Dothan and, I understand, is being leased and rented by them for purposes of profit.

"In the light of the above statements of fact, I desire your official opinion as to whether any part of this property still in the hands of the original purchasers, and leased or rented by them for purposes of profit, is subject to taxation by Dale County."

It is my opinion that the property still in the hands of Houston County and the City of Dothan is exempt from ad valorem taxation, notwithstanding the fact that such property is leased or rented by them for purposes of profit. I assume from the statement of facts that by the expression "in the hands of the original purchaser" you mean "owned by the original purchaser."

Constitution of Alabama 1901, Section 91, provides that, "The legislature shall not tax the property, real or personal, of the state, counties or other municipal corporations, * * *."

This office has previously ruled that property owned by the state, county, or a municipal corporation is not subject to the imposition of ad valorem taxes by other political subdivisions. Biennial Report of Attorney General, 1936-38, p. 762; Quarterly Report of Attorney General, Vol. 3, p. 134. This office has also ruled that property owned by a municipal corporation and leased to the Army Air Forces is exempt from ad valorem taxes. Quarterly Report of Attorney General, Vol. 36, p. 62.

Constitution of Alabama 1901, Section 91, does not base the exemption of state, county, or city property from taxation upon the use thereof. The latter part of Section 91 exempts property used exclusively for religious worship, for schools, or for purposes purely charitable. The property of a city and county, however, is exempt regardless of the use made thereof.

I call to your attention an opinion found in Quarterly Report of Attorney General, Vol. 22, p. 226, which holds that property of a municipality in the possession of a vendee under an executory contract for the sale of such property is subject to assessment for state and county taxes as the property of the vendee.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 10, 1947.

Mr. J. F. Craig, Clerk,

Walker County Board of Revenue,

Jasper, Alabama.

Counties—County Officials—Insurance—

Title 12, Section 12, Subsection 23, Code of Alabama 1940.

1. The county governing body is authorized to pay the premium on burglary or robbery insurance policies designed to protect the funds of the county, in the lawful custody of the officials thereof, against loss through burglary or robbery.

2. Payment of such premium may be made by the county whether the officials having custody of such county funds be paid by a salary or a fee system.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 27, 1947, is as follows:

"Can the County pay premium on burglar insurance, messenger holdup on County funds handled by Treasurer, Probate Judge, Circuit and County Clerks who are on salary and not fee system, also can county pay for Tax Collector the same insurance who is still on fees system?"

I am of the opinion that your inquiry should be answered in the affirmative. Authority for such an expenditure is found within Title 12, Section 12, Subsection 23, Code of Alabama 1940, wherein it is provided that the county governing body has the authority:

"To insure in solvent companies the courthouse, jail, machine shops and other buildings of the county against loss by fire and storm, to insure in solvent companies the trucks, tractors, gas shovels, graders, automobiles and other personal property of the county against loss by fire and theft and against liability for damages to person and property. Payments heretofore made for these purposes are validated."

It has been held by former opinions of this office that, under the authority of the above statute, a county may pay premiums for burglary and robbery insurance for protection of funds of the tax collector and judge of probate, provided such funds are the property of the county. Biennial Report of Attorney General, 1934-36, page 349; Quarterly Report of Attorney General, Vol. 17, page 228.

It is my opinion that under the authority granted by the above statute the county governing body may also legally pay the premium for burglary and robbery insurance for the protection of county funds lawfully within the custody of other county officials, including those mentioned in your inquiry, the circuit and county clerk and the county treasurer. The protection afforded by such policy of insurance being primarily for the benefit and protection of the county rather than the individual, it is my opinion that the county may legally pay the premium on policies issued to any county official lawfully having within his custody funds of the county.

In my opinion, it is immaterial whether the county official named within such policy is serving on a salary or fee system. Such fact can in no way affect the nature of the bulk of the funds within his custody and control. If on a salary, such official is required to pay over to the county all public money collected or received by him. If such official receives his compensation under a fee system, the only difference would be that such official would retain for his own use that fee or commission allowed him by law, paying over to the county the remainder of the money collected or received by him. In either event such official would have within his custody funds of the county, for the protection of which the county may legally secure burglary or robbery insurance and pay the premiums thereon.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 10, 1947.

Hon. C. E. Corprew,
Sheriff, Tallapoosa County,
Dadeville, Alabama.

Sheriffs—Deputies—Tallapoosa County—Statutes—Constitutionality—Act No. 455, Local Acts 1931, p. 225, as amended—Act No. 94, Local Acts 1947, approved July 7, 1947—Title 54, Section 3, Code of Alabama 1940, as amended by Act No. 81, General Acts 1943, p. 86—Constitution of Alabama 1901, Section 105.

Act No. 94, Local Acts 1947, approved July 7, 1947, fixing the salary of the chief deputy sheriff of Tallapoosa County, is unconstitutional in that it violates the Constitution of Alabama 1901, Section 105.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of August 8, 1947, is as follows:

"A bill was passed recently in this County raising the salary of the Chief Deputy Sheriff. This bill was signed by the Governor on July 7, 1947. Please tell me would this bill be effective as of July 7, 1947, the date that the Governor signed it?"

The Act referred to in your inquiry is Act No. 94, Local Acts 1947, approved July 7, 1947. This act amended Act No. 455, Local Acts 1931, p. 225, as previously amended. The only purpose of this amendatory act was to provide (1) that the deputy sheriff at Dadeville, which deputy the sheriff is required to appoint under Act No. 94, *supra*, shall be known as the chief deputy sheriff, and (2) that the said designated chief deputy sheriff "shall be paid a salary of not less than Eighteen Hundred and no/100 (\$1800.00) Dollars and not more than Twenty seven hundred and no/100 (\$2700.00) Dollars per annum, the exact amount within said limits to be fixed by the Court of County Commissioners of Tallapoosa County, Alabama."

Act No. 455, as previously amended, *supra*, did not designate the deputy sheriff at Dadeville as the chief deputy sheriff and fixed the salary of said deputy sheriff at \$1800.00 per annum.

In the case of *Evans v. Long*, 227 Ala. 335, 149 So. 837, the court held that a local act (Act No. 500, Local Acts 1923, p. 319), providing that the salary of the chief deputy sheriff of Walker County should be \$1800.00 per annum, whereas the general law (Code of Alabama 1923, Section 10188) provided that the salary of the chief deputy sheriff should be

not less than \$900.00 nor more than \$1500.00 per annum, was unconstitutional in that it violated the Constitution of Alabama 1901, Section 105, which prohibits the enactment of a local law in any case which is provided for by a general law. See also Quarterly Report of Attorney General, Vol. 18, p. 68.

The salary of the chief deputy sheriff is now fixed by Title 54, Section 3, Code of Alabama 1940, as amended by Act No. 81, General Acts 1943, p. 86, at "not less than nine hundred and not more than twenty-four hundred dollars."

In view of the above authorities, it is my opinion that Act No. 94, supra, fixing the salary of the chief deputy sheriff of Tallapoosa County at "not less than Eighteen Hundred and no/100 (\$1800.00) Dollars and not more than Twenty seven hundred and no/100 (\$2700.00) Dollars per annum, the exact amount within said limits to be fixed by the Court of County Commissioners of Tallapoosa County, Alabama," is unconstitutional in that it violates the Constitution of Alabama 1901, Section 105, the salary of the chief deputy sheriff having been fixed at "not less than nine hundred and not more than twenty-four hundred dollars" by Section 3, supra, as amended.

In view of the above conclusions, it is not necessary to discuss the question presented by your inquiry as to the effective date of Act No. 94, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 11, 1947.

Hon. O. E. Cole, Chairman,
Court of County Commissioners,
Russell County,
Phenix City, Alabama.

Counties—Agriculture and Industries.

A county has no authority to pay accrued annual or sick leave to either a county agent or a farm demonstration agent after the date of the termination of the employment.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, dated August 12, 1947, is as follows:

"The County Agent of Russell County resigned his office effective June 30, 1947. Also, the Home Demonstration Agent resigned

effective August 1, 1947. They have each filed claim against the County for annual leave and sick leave. Will you be so kind as to render me, as Chairman of the Russell County Court of County Commissioners, an official opinion at your earliest convenience on the following:

"Can Russell County legally pay these two claims based on annual leave and sick leave?

"I am enclosing herein the claims as filed and trust that you will return same to me when you render your opinion."

I am of the opinion that both portions of your inquiry should be answered in the negative.

Neither the county agents nor the home demonstration agents are under the so-called "State Merit System Law" (Title 55, Sections 293-327, Code of Alabama 1940). Both are employed through the Alabama Extension Service under the provisions of Title 2, Section 651, Code of Alabama 1940.

I know of no authority of law whereby the county may pay for accrued annual or sick leave after the date of the termination of the employment of either of the employees under consideration.—Cf. Quarterly Report of Attorney General, Vol. 27, p. 72.

I am returning herewith the claims in question.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 11, 1947.

Hon. L. E. Sanderson,
City Clerk,
Lawrence County,
Town Creek, Alabama.

Municipalities—Taxation—Assessments—Title 7, Section 22,
Code of Alabama 1940—Title 37, Section 670, Code of Alabama
1940.

An action to recover ad valorem taxes due a town or city,
when lawfully assessed, may be instituted at any time within
five years after the taxes became delinquent.

Opinion by Assistant Attorney General Tiller.

Dear Sir:

Your request for an official opinion, bearing date of June 30, 1947,
is as follows:

"Our city wants the law or your opinion as to how far back we can collect a city ad valorem tax.

"Our city has about 700 or 750 people."

Your request presupposes that there has been a lawful assessment of property located within your town for ad valorem taxation. In the event the taxes have been regularly and lawfully assessed, then your town, under the provisions of Title 7, Section 22, Code of Alabama, 1940, has five years next after the tax became delinquent in which to institute an action to recover the same.

Said Section 22 specifically provides that "all actions by the state or any subdivision thereof for the recovery of amounts claimed for licenses, franchise taxes or other taxes," must be commenced within five years. The clause "or other taxes" contained in the above quotation is broad enough to include, and does include, ad valorem taxes. *Bradford et al v. City of Huntsville*, 215 Ala. 591, 112 So. 200; *Howell & Graves v. Curry*, 242 Ala. 122, 5 So. (2d) 105.

As stated hereinabove, your request presupposes that there has been a lawful assessment of property located in your municipality for ad valorem taxes. Of course, a legal assessment for taxation is the first essential or prerequisite and without this, there is nothing upon which you can base a claim for taxes. It is my understanding that a great many of the cities and towns undertake annually to collect an ad valorem tax without ever having made any assessment therefor. There is no authority in the law for such procedure. It is necessary that a municipality assess property located therein for taxation just as the state and county must assess property for taxation.

The provision for the assessment of municipal taxes is found in Title 37, Chapter 15, Code of Alabama 1940. Section 670 thereof provides specifically as follows:

"After the first day of October of each year, cities and towns may levy taxes upon property and all subjects of taxation liable therefor, at a rate not in excess of the constitutional limit, upon assessments to be made by the city or town clerk, or other person designated by the council, such assessment to be made on the state assessment in the manner provided by the constitution of the state, or in the manner hereinafter authorized by law. After the assessment has been made, it shall be returned to the council, which shall thereupon give ten days' notice, by publication in a newspaper published in the city or town, or if no newspaper is published in such city or town, then by posting notices in three or more places, in such city or town, that the assessment has been completed and that the council will hear and determine objections thereto upon a day not more than thirty days from the date on which said notice was directed to be made, * * * *"

The procedure provided for in said Section 670 is essential, and if your municipality has not followed such procedure, then you do not have a valid assessment upon which an action could be based. However, assuming that your municipality has complied with the requirements of said Chapter 15, and you state nothing to the contrary, you, as stated hereinabove, would have five years next after the tax became delinquent within which to take necessary action to collect the taxes.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 11, 1947.

Hon. C. E. Corprew, Sheriff,
Tallapoosa County,
Dadeville, Alabama.

Costs and Fees—Sheriffs—Fine and Forfeiture Fund—

Title 11, Section 100; Title 45, Section 69 as amended by Act No. 57, General Acts 1945, p. 58; Title 11, Section 83(d); Title 15, Section 393, Code of Alabama 1940.

1. Fee of sheriff for the removal of prisoner to another jail for safekeeping provided for by Title 11, Section 100, Code of Alabama 1940, payable from the fine and forfeiture fund of the county upon conviction of defendant for a felony and return of execution against defendant "no property found."

2. Such fee is likewise payable from the fine and forfeiture fund of the county if the defendant is acquitted, or the case is nol-prossed or abated by death of the defendant.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of April 19, 1947, is as follows:

"Please give me an opinion on the following proposition:

"Is the Sheriff of Tallapoosa County entitled to Guard Fee together with the actual necessary traveling expenses of himself or deputy to be paid by Tallapoosa County for removing a prisoner to Kilby Prison at Montgomery, Alabama, for safe keeping from Dadeville, Alabama and for returning such prisoner for trial, on the written order of the Presiding Judge of the Circuit Court, because the

Tallapoosa County jail is insecure or unsafe and there is no safe jail in said County to keep such prisoner?

"Such expense has been necessarily incurred by me and I shall be grateful for you to advise if Tallapoosa County is due to pay me such expense.

"Both parties were charged with Burglary.

"Neither party has been tried in our court yet. They arrived here in Dadeville after court had adjourned; therefore, they have not been indicted by this court.

"I am still holding warrants for the both of the above named persons on the Charge of Burglary."

Title 11, Section 100, Code of Alabama 1940, relating to sheriffs' fees, is in part as follows:

"* * * * * For removing any prisoner in cases where there is no jail in the county in which the offense is committed, or the jail therein is insecure, to the jail of another county, and for returning him to the jail of the county from which he was removed or to court for trial, three dollars for himself or his deputy acting in his stead, and two dollars for each guard for each day they are respectively engaged in such removal, together with the actual necessary traveling expenses of himself or deputy, and guard or guards, and prisoner or prisoners, while on the trip, by the nearest route usually traveled between the points from and to which such removal is made, to be taxed against, and paid by such prisoner, on conviction, or, if he is insolvent, or is acquitted, by the county in which the offense was committed; but in no case shall the county to which such prisoner was removed be liable for such costs or fees. * * * *"

While "jail" is referred to in the above statute, this office, in Quarterly Report of Attorney General, Vol. 28, p. 63, held the word "jail" as used therein to include a state prison.

Under Title 45, Section 69, Code of Alabama 1940, as amended by Act No. 57, General Acts 1945, p. 58, when a defendant is convicted and sentenced to the penitentiary, the State pays certain designated items of cost as provided in said section; subject, however, to the limitation of two hundred and fifty dollars in any one case as provided for in Title 45, Section 70, Code of Alabama 1940. No fee that is not expressly provided for in Section 69 may be paid by the State out of the convict fund. Biennial Report of Attorney General, 1932-34, p. 165; Biennial Report of Attorney General, 1920-1922, p. 48. Inasmuch as the fee allowed a sheriff for transporting a prisoner to another jail is not a fee enumerated in Section 69, as amended, such fee may not be paid by the State from the convict fund.

Your attention is in turn called to Title 11, Section 83, Code of Alabama 1940, Subsection (d), which provides as follows:

"(d) In all cases in which the defendant is convicted for a felony, fees for services rendered must be taxed and judgment rendered against the defendant therefor and paid by the State to the extent as provided by law, and all other fees of sheriffs, clerks of court and state's witnesses not paid by the state shall be claims against the fine and forfeiture fund in the event an execution against the defendant is returned 'no property found' and such claims are evidenced as required by law."

It will be seen from Section 83(d) that when a defendant is convicted in a felony case the fees of the sheriff not paid by the State are a claim against the fine and forfeiture fund of the county in the event execution is issued against defendant and returned "no property found." It, therefore, follows that in a conviction in a burglary case the fee allowed the sheriff by Title 11, Section 100, Code of Alabama 1940, not being payable by the State from the convict fund, may be paid from the county fine and forfeiture fund.

This fee should be taxed as a part of the costs in the case on conviction in the same manner as any other fee payable from the fine and forfeiture fund of the county. (Compare opinion in Quarterly Report of Attorney General, Vol. 35, p. 55, for analogy.)

In the event the case is nol-prossed or the defendant is acquitted upon the trial, or the case is abated by the death of the defendant, the sheriff is entitled to collect his costs from the fine and forfeiture fund of the county under the provisions of Title 15, Section 393, Code of Alabama 1940.

From the above, it appears that your fee as sheriff in transporting the prisoners referred to would in any event be collected from the fine and forfeiture fund of Tallapoosa County, except in instances where said fee was collected from the defendant upon execution.

However, in no event can such fee be collected until final disposition of the case.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 15, 1947.

Hon. Brooks Glass, Director,
State Department of Commerce,
CAPITOL.

Insurance—Bureau of Rates—Act No. 132, General Acts 1945,
p. 133—Act No. 133, General Acts 1945, p. 145.

1. Any change in a rate or rating system resulting from an order of the Supervisor of Rates may only be applied to policies written on or before the effective date of such order.

2. The Supervisor of Rates is without authority to give retroactive effect to an order made by him authorizing a change in a rate or rating system.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of June 27, 1947, is as follows:

"The Bureau of Rates of the Department of Commerce frequently receives from rating organizations, and from insurance companies filing their own rates with the Bureau, requests for approval of changes in rates and in rating plans.

"In many instances, while the change is applicable to all new policies dated subsequent to the effective date of approval by this Bureau, there is a clause in the request for approval providing for its use, at the discretion of the agent, for existing policies issued prior to the approval date but subsequent to some specified earlier date.

"There is quoted below an example of the type of provision often submitted to the Bureau of Rates for approval:

"These rules and rates are applicable to all new and renewal policies written on or after July 1, 1947. A policy that was written to become effective between May 1, 1947 and July 1, 1947 may be endorsed or cancelled and rewritten on the basis of the new rules and rates as of its inception date."

"The rating laws of Alabama, as contained in Acts 132 and 133, Alabama General Laws, passed in Regular Session, 1945, contain the following provisions in regard to the effective date of changes in rates and in rating plans:

"Act 132—Section 9—Changes in rates resulting from an order of the Bureau directing or approving alterations or revisions in rat-

ing systems shall become effective following the date of such order as fixed by the Supervisor and shall be applied to policies written on or after such effective date.'

"'Act 133—Section 8—Changes in rates resulting from an order of the Bureau directly or approving alterations or revisions in rating plans shall become effective following the date of such order as fixed by the Supervisor and shall be applied to policies written on or after such effective date.'

"The intent of the law appears to be clear as regards the mandatory application of the new rates and rules in the case of new policies written on or after the effective date of approval by the Bureau. It is not clear, however, whether the law was intended as a prohibition of the practice of endorsing existing policies, without changes in their inception dates, to take advantage of the approved changes in rates or rating plans and thus, in effect, making use of such changes on a date prior to the approved effective date.

"Neither is it clear as to whether the Supervisor may establish the effective date retroactively.

"In view of the information set forth above, you are respectfully requested to answer the following questions for the guidance of the undersigned and of the Supervisor of Rates:

"1. Is it permissible for a rating organization, or a company filing its own rates, to make effective in any manner a change in rates or rating plan prior to the date on which the change is manually approved by the Supervisor or such other date subsequent thereto as may be specified by the applicant to be the effective date?

"2.(a) May the Supervisor of Rates give retroactive approval to a change in rate or rating plan by establishing as the effective date a date prior to the one on which manual approval is given by him?

"(b) If the answer to (a) above is in the affirmative, is it mandatory that all policies bearing an inception date subsequent to the effective date thus retroactively established, but dated prior to the date of manual approval, be written or endorsed, at the option of the assured, to comply with the new rule and/or rates?

"Your assistance in this matter will be appreciated."

Act No. 132 and Act No. 133, referred to in your request, are found in General Acts 1945, pages 133 and 145, respectively. Act No. 132 deals with the regulation of fire insurance companies, and Act No. 133 deals with the regulation of casualty and surety insurance companies. The provisions of these Acts, insofar as your request is concerned, are sub-

stantially the same. For this reason, I will only consider the applicable provisions of Act No. 132. The conclusions hereinafter reached with respect to Act No. 132 are equally applicable to Act No. 133.

Section 8 of Act No. 132 provides as follows:

"Section 8. Beginning with the one hundred eightieth day after this Act takes effect, every insurer shall, before using or applying any rate to any kind of insurance, coming within the scope of this Act, file with the Bureau a copy of the rating system upon which such rate is based, or by which such rate is fixed or determined. The filing herein required may be made on behalf of such insurer by a rating organization of which such insurer is a member or subscriber. The provisions of this section shall be deemed to have been complied with by any insurer which had, before the effective date of this Act, been a member or subscriber of a rating organization doing business in this State. From and after the date of the filing of such rating systems, every insurer shall charge and receive rates fixed or determined in strict conformity therewith, except as in this Act otherwise expressly provided."

It will be seen from the above section that after a copy of the rating system upon which rates are based has been filed with the Bureau of Rates by or on behalf of an insurer, the insurer must charge and receive rates determined in strict conformity with such rating system, except as otherwise expressly provided in Act No. 132.

Changes in rates or rating systems may be made only upon the order of the Supervisor of Rates, as provided in Sections 9, 11, 12 and 17 of Act No. 132.

Section 9 of Act No. 132 provides, in part, as follows:

"Changes in rates resulting from an order of the Bureau directing or approving alterations or revisions in rating systems shall become effective following the date of such order as fixed by the Supervisor and shall be applied to policies written on or after such effective date."

It is my conclusion that under the provisions of Section 9, *supra*, any change in a rate or rating system resulting from an order of the Supervisor of Rates may only be applied to policies written on or after the effective date of such order. It therefore follows that your first inquiry must be answered in the negative.

An answer to your question numbered 2(a) also calls for a consideration of the provision of Section 9 of Act No. 132 quoted above.

As stated above, the Supervisor of Rates may make a change in a rate or rating system by an order made under the provisions of Sections 9, 11, 12, and 17 of Act No. 132. To hold that the Supervisor of Rates

may by such order give retroactive approval to a change in a rate or rating system by establishing as the effective date of such change a date prior to his approval of such change, would have the effect of permitting an insurer to apply a rate or rating system before such rate or rating system had been approved by the Supervisor of Rates as required by Act No. 132.

Furthermore, Section 9, *supra*, expressly provides that any change in a rate or rating system resulting from an order of the Bureau directing or approving such change shall become effective following the date of such order as fixed by the Supervisor, and shall be applied to policies written on or after such effective date.

It is my conclusion that the Supervisor of Rates is without authority to give retroactive effect to an order made by him authorizing a change in a rate or rating system. It is, therefore, my opinion that your inquiry numbered 2(a) should be answered in the negative.

The conclusion reached in answering your inquiry numbered 2(a) makes a consideration of your inquiry numbered 2(b) unnecessary.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 16, 1947.

Hon. Brooks Glass, Director,
Department of Commerce,
CAPITOL.

Insurance—Bureau of Rates—Act No. 132, General Acts 1945, p. 133—Act No. 133, General Acts 1945, p. 145.

The application of rates arrived at by interstate rating would defeat the intent of the statutes, and result in the application of rates in this State to risks involving essentially the same hazards which are unfairly discriminatory and are, therefore, in violation of Act No. 132, General Acts 1945, p. 133, and Act No. 133, General Acts 1945, p. 145.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of June 25, 1947, is as follows:

"A question has arisen in the administration of the insurance rating laws of Alabama pertaining to the proper interpretation of certain provisions of the Statutes. In order that the Director of

Commerce and the Supervisor of Rates may carry out their responsibilities in the application of such laws, it is requested that you issue an advisory opinion for the guidance of the undersigned in answer to the query propounded below.

"In explanation of the necessity for this request, it should be noted that a practice usually spoken of as 'interstate rating' has long been common in the fire and casualty insurance business. Under this practice, a composite premium rate is developed by the insurer, such rate being applied to all property of the assured covered by the policy wherever such property may be located and without particular regard to state lines or to strict adherence to rating laws.

"It is believed that one of the primary objectives of the rating laws of Alabama is to achieve the application of like rates for like risks insofar as any one insurer is concerned. It is possible that the practice described herein may defeat this objective. There are quoted below certain excerpts from the rating laws of Alabama that make questionable the propriety of the application of an interstate rating plan to risks in Alabama. This question results from the fact that differences in rates for like physical risks are contemplated by, and inherent in, such a plan. The quotations below are from Acts 132 and 133, Alabama General Laws, as passed in Regular Session, 1945.

"Act 132—Section 6 'Every rating organization, and every insurer which makes its own rates, shall make rates ----- which do not unfairly discriminate between risks in this State involving essentially the same hazards.'

"Act 132—Section 9 'If, after examination thereof, the Supervisor shall find that such rating systems filed by or on behalf of an insurer ----- are unfairly discriminatory between risks in this State involving essentially the same hazards, he shall issue an order ----- directing that such rating system be altered ---- to produce rates that are ----- not unfairly discriminatory.'

"Act 133—Section 5 'Every rating organization and every insurer shall make its own rates, ----- which do not unfairly discriminate between risks in this State.'

"Act 133—Section 8 'If, after examination thereof, the Supervisor shall find that such rating plans filed by or on behalf of an insurer provide for, result in, or produce rates that ----- are unfairly discriminatory between risks in this State involving essentially the same risks, he shall issue an order ----- directing that such rating plans be altered -----.'

"Both acts also make numerous references to the fact that the

Supervisor of Rates shall not approve rates which are 'unfairly discriminatory.'

"As a simple and practical illustration of the application of interstate rating, Company A owns a textile mill in Alabama but owns no property outside the State. The approved insurance rate on its property is \$1.00. Company B owns a mill in Alabama exactly like that of Company A and owns another one of the same size and description in Georgia. Because of unusually favorable circumstances surrounding the Georgia mill, that unit is entitled to a 30 cent premium rate. As a result, a composite rate of 65 cents is charged for all of Company B's property. In actual practice, the situation may be reversed and the Alabama unit of Company B may take a higher rate than the mill of Company A because of unfavorable rate factors applying only to the Georgia unit.

"In view of the fact that the principle involved is of considerable importance to this Department, you are respectfully requested to give your opinion as to whether the use of 'Interstate rating' of fire and casualty insurance risks is discriminatory and, therefore, is in violation of Acts 132 and 133, Alabama General Laws, Regular Session, 1945."

Act No. 132 and Act No. 133, referred to in your request, are found in General Acts 1945, pages 133 and 145, respectively. Act No. 132 deals with the regulation of fire insurance companies and Act No. 133 deals with the regulation of casualty and surety insurance companies. The provisions of these acts, insofar as your request is concerned, are substantially the same.

"The nature of the regulations with which the insurance companies must comply, and the degree of supervision which may be exercised by the state department of insurance or by state insurance officers, are dependent on the terms of the applicable constitutional or statutory provisions of the state. The general object of statutes providing for state regulation is to make certain that the citizen will secure the indemnity for which he contracts and that the rates and charges for insurance which may be required of him will be reasonable and nondiscriminatory. * * * * * Statutes designed to regulate the insurance business should be liberally construed to effect the purpose to be served and to prevent and correct evils growing out of the conduct of such business, but on the other hand it has also been held that statutes which prescribe the specific powers of a state insurance board are to be strictly construed as to the extent of the authority of the board. * * * * *" 44 C. J. S., Insurance, Section 60.

A majority of the State statutes regulating rates of insurance companies have been enacted within the last two years. Because of the very recent enactment of such statutes, a careful search fails to reveal any decisions of the courts on the question presented by your inquiry. I have only the wording of the statutes under consideration on which to base my conclusions.

Under the provisions of Section 6 of Act No. 132, supra, rates charged by fire insurance companies may not "unfairly discriminate between risks in this State involving essentially the same hazards." A similar provision in reference to casualty and surety insurance companies is contained in Section 5 of Act No. 133, supra.

Under the provisions of Section 9 of Act No. 132, supra, if the supervisor of rates finds that a rating system filed by or on behalf of an insurer results in or produces rates that are "unfairly discriminatory between risks in this State involving essentially the same hazards," he shall issue an order directing that such rating system be altered to produce rates that are not unfairly discriminatory. A similar provision is contained in Section 8 of Act No. 133, supra, dealing with casualty and surety insurance companies.

It is evident from the above provisions of Act No. 132 and Act No. 133 that it was the intention of these statutes that the same rates should apply to "risks in this State involving essentially the same hazards." (Emphasis supplied.)

It is my opinion that the application of rates arrived at by interstate rating (as set out by the illustration in your request) would defeat the intent of the statutes and result in the application of rates in this State to risks involving essentially the same hazards which are unfairly discriminatory and are, therefore, in violation of Act No. 132 and Act No. 133.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 16, 1947.

Honorable C. C. Horton,
State Service Commissioner,
Department of Veterans' Affairs,
P. O. Box 1509,
Montgomery 2, Alabama.

Notaries Public—County Service Officer—

Act No. 173, General Acts 1945, page 304—

Act No. 431, General Acts 1943, page 400—

Constitution of Alabama 1901, Section 175.

1. Those persons appointed notaries public for the state at large in compliance with Section 12 of Act No. 173, General Acts 1945, page 304, can be removed from office only by impeach-

ment proceedings as prescribed by Constitution of Alabama 1901, Section 175.

2. When the Constitution provides the mode for the removal of an officer by impeachment it is a denial of any other mode of removal, and the Governor cannot remove such person from office by revocation or cancellation of his appointment if the Constitution requires removal by impeachment.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of July 1, 1947, is as follows:

"The law creating this Department (Act No. 173, approved June 23, 1945, General Acts, Regular Session 1945, at page 304) provides under Section 12, that all County Service Commissioners shall be appointed notaries public.

"Since the inception of the Department and at the present time all 67 County Service Commissioners are notaries public for the State at Large, and in addition thereto all Assistant State Service Commissioners and several Assistants in County Offices are notaries public for the State at Large.

"The State of Alabama pays for all the notary bonds, in the amount of \$10.00 each, and cost of seals of office.

"During the twenty-one months of operation of this Department there has necessarily been some turn over of personnel who previously were appointed notaries public, and there will continue to be resignations and other discontinuances of employment.

"The United States Fidelity and Guaranty Company issues all notary bonds for the Department. We made inquiry of this Company as to whether or not refunds could be made to the State of unearned portions of bond premiums. In answer to our inquiry, this Company informed us there will be a minimum charge of \$2.50 and that the proportionate part of the balance up to \$10.00 may be refunded if the State of Alabama has authority to revoke notary appointments in the absence of fraud.

"The question at issue is whether or not the Governor of Alabama has authority to revoke a notary public appointment, in the absence of fraud, in cases wherein the appointee was an employee of the State of Alabama and the bond and seal are paid for with State funds; such revocation to be accomplished subsequent to the appointee's employment with the State?

"It comes to our minds that if the Governor has such authority the State of Alabama might accomplish refund of a considerable sum of money, as this circumstance would apply to all State Departments. There is also the thought of effecting a return of notary seals which might be again used by replacing the metal disc which bears the individual's name.

"Your opinion on this subject will be appreciated."

Act No. 173, General Acts 1945, page 304, provides for the creation and functioning of the State Department of Veterans' Affairs. Section 12 of such act provides as follows:

"The State Commissioner shall have a seal of office and he, the Assistant State Service Commissioner, and each District Service Commissioner and County Service Commissioner shall be appointed notaries public and authorized to administer oaths to any person or persons who may desire to swear to the correctness of any statement or statements made in connection with any application for compensation, hospitalization, insurance, or any other service, aid or benefit, to which such person or persons, or any other person or persons on whose behalf the affidavits are made, may be entitled under existing laws of the United States, or such as may hereafter be enacted; and he shall likewise be authorized and empowered to certify to the correctness of any document or documents which may be submitted in connection with any such application or applications."

You inform me that, in conformity with the above section, all those persons occupying the above designated positions of employment have been appointed notaries public for the state at large, with premiums upon the required bonds being paid by the State of Alabama. You also inform me that in the normal course of personnel changes certain of those persons formerly occupying the above named positions of employment have left the employ of the State of Alabama. You inquire as to whether such persons' appointments as notaries public for the state at large may be revoked or cancelled by the Governor.

It is my opinion that the Governor is without authority to revoke or cancel such appointments. Such officers fall within the purview and protection of Section 175, Constitution of Alabama 1901, and may be removed from office only in the manner prescribed by such constitutional provision.

Act No. 431, General Acts 1943, page 400, provides for the appointment by the Governor of a competent number of notaries public for the state at large, fixes their term of office as a term of four years commencing with the date of their commission, defines their jurisdiction, power and authority, and provides for the making of bond and the adoption of a seal. This act further provides that such notaries public for the state at large shall perform all the acts and exercise all authority now performed and exercised by notaries public under the general laws of the

State of Alabama. Such powers and authority are set out in Title 40, Sections 5 and 13, Code of Alabama 1940, and include all powers purportedly granted by Section 12 of Act No. 173, supra.

It is, therefore, my opinion that Section 12, supra, grants to the notaries public appointed thereunder no new powers, but is merely a reiteration of certain of those powers already possessed by such persons by virtue of their appointment as notaries public for the state at large. Neither is such section any limitation upon the powers possessed by those persons appointed as notaries public. Therefore, I do not feel it could be properly held that those persons appointed notaries public by virtue of this section possessed certain powers incident to their employment which powers ceased upon their ceasing to be State employees. It is my opinion that such persons were invested with all the power and authority of other notaries public and that they continue to possess such powers and authority even after termination of their employment with the State of Alabama.

In my opinion, it is not material to the question here considered that the State of Alabama paid the premiums on the required bonds of those persons appointed notaries public. Although I find no provision of Act No. 173, supra, requiring the State to make such payments, in my opinion the fact that the State did make such payments can in no way alter or affect the term of office to which such persons were appointed. Neither would such fact subject those persons appointed to removal from office as notaries public other than in the manner prescribed by law.

Next considered is your question concerning the termination or cancellation of such appointments. There is no provision within Act No. 431, supra, which act provides for appointment by the Governor of notaries public for the state at large, relative to the manner by which such appointments may be terminated other than by expiration of the four year term of office provided for therein.

Constitution of Alabama 1901, Section 175, makes provision for the removal from office of certain officers, including notaries public, in the following manner:

"The clerks of the circuit courts, or courts of like jurisdiction, and of criminal courts, tax collectors, tax assessors, county treasurers, county superintendents of education, judges of inferior courts created under authority of section 168 of this constitution, coroners, justices of the peace, notaries public, constables, and all other county officers, mayors, intendants and all other officers of incorporated cities and towns in this state, may be removed from office for any of the causes specified in section 173 of this constitution, by the circuit or other courts of like jurisdiction or a criminal court of the county in which such officers hold their office, under such regulations as may be prescribed by law; provided, that the right of trial by jury and appeal in such cases shall be secured."

It has been held by numerous decisions of the Supreme Court of Alabama that where the Constitution provides the mode for the removal of an officer by impeachment it is a denial of any other mode of removal, hence the Governor cannot remove such person from office by revocation or cancellation of his appointment if the Constitution requires his removal by impeachment. This rule of law is found stated in the decision of the Supreme Court rendered in the case of *Nolen v. State ex rel. Moore*, 118 Ala. 154, 24 So. 251, and has been subsequently reaffirmed in numerous decisions, including those decisions rendered in the cases of *State ex rel. Williams v. Owens*, 217 Ala. 668, 117 So. 298; *Bradford v. State ex rel. Esslinger*, 226 Ala. 342, 147 So. 182; *Owens v. City Council of Troy*, 229 Ala. 439, 157 So. 865.

It is, therefore, my opinion that those persons appointed by the Governor as notaries public for the state at large can be removed during their four year term of office only by impeachment proceedings, as prescribed by Section 175, Constitution of Alabama 1901.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 16, 1947.

Hon. J. G. Kimbrough,
Probate Judge and Ex-Officio Chairman,
Court of County Commissioners,
Washington County,
Chatom, Alabama.

Counties—Tuberculosis Sanatorium—Title 22, Section 192,
Code of Alabama 1940—Act No. 287, General Acts 1945, Page 474.

Appropriation made by county governing body under the authority of Act No. 287, General Acts 1945, page 474, for the purpose of constructing tuberculosis sanatorium does not come within the purview or limitations of Title 22, Section 192, Code of Alabama 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, dated March 11, 1947, is as follows:

“On December 9th, 1946, by resolution spread upon its Minutes, the Court of County Commissioners of Washington County, Alabama, appropriated the sum of \$12,000.00, payable upon call, for the purpose of paying its prorata share of the cost of building and equipping

a Tuberculosis Sanatorium to be located in the 6th District composed of Baldwin, Choctaw, Clarke, Mobile and Monroe counties under the provisions of Act #287 (General Acts, 1945, page 474), approved July 7, 1945, but before making payment of any part of said appropriation, I wish to have you advise me if I will be restricted from signing warrants in excess of one mill of the assessed value of the property in Washington County, in any one year, and also, whether or not, any balance on said appropriation may be paid during the next two consecutive years, and, also, should each yearly appropriation, based upon the assessed value of property in Washington County, be set up each year, all as provided for under Section 192, Title 22, of the 1940 Code of Alabama?"

In answer to your inquiry, you are advised that the appropriation of \$12,000.00 made by the county governing body of Washington County as its prorata share of the cost of constructing a tuberculosis sanatorium under the authority of Act No. 287, General Acts 1945, page 474, does not come within the purview or limitation of Title 22, Section 192, Code of Alabama 1940.

Title 22, Chapter 6, Article 2, Code of Alabama 1940, of which Section 192 is a part, and Act No. 287, supra, set up two separate and distinct methods of establishing and constructing tuberculosis sanatoriums.

Article 2, supra, contemplates the establishment of tuberculosis sanatoriums on a county unit basis, while on the other hand Act No. 287, supra, divides the State into seven separate and distinct districts for the purpose of establishing and constructing such sanatoriums. Act No. 287, supra, contemplates State and Federal aid in the construction of these sanatoriums, but it is to be noted that Article 2, supra, is silent in this regard. In other words, the method of financing the constructing and equipping of these sanatoriums is entirely different in the two methods here considered.

Your attention is called to Section 2 of Act No. 287, supra, wherein it is provided that this Act is cumulative to Article 2, supra, thus showing that the Legislature intended that the act and the article be considered as independent methods of establishing and constructing tuberculosis sanatoriums.

You are therefore advised that the appropriation made by your county under the authority of Act No. 287, supra, does not come within the purview or limitation of Title 22, Section 192, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 16, 1947.

Hon. G. B. Pittman, Jr.,
Tax Assessor,
Russell County,
Phenix City, Alabama.

Municipalities—Taxation—Title 37, Section 698, Code of Alabama 1940.

Municipal taxes levied by the governing body of a municipality on or after April 15, 1947, are due and delinquent on and after October 1, 1947.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of April 21, 1947, is as follows:

"Below I quote the exact wording of a ballot used in Phenix City on April 15, 1947.

"'Shall the Court of County Commissioners of Russell County, Alabama, levy and collect annually for a period of twenty-two (22) years to begin with the tax year October 1, 1947, and ending with the tax year September 30, 1969, a special tax of Thirty Cents (30 cents) on each One Hundred Dollars (\$100.00) worth of taxable property in said school district comprising all territory located in the corporate limits of the city of Phenix City, Alabama for public school purposes in said district?"

"Five hundred ninety-five (595) persons voted in favor of the proposition and ninety (90) voted against it.

"Please advise me, immediately if possible, if I am to compute the above tax for the current year, which taxes become payable on October 1, 1947. Since the time is limited for me to complete the assessment record I shall thank you to reply at your earliest possible time."

My answer to your inquiry is in the affirmative.

I have been advised by you that the City of Phenix City has adopted an ordinance as provided by Title 37, Section 698, Code of Alabama 1940, which ordinance provides that the municipal tax year shall begin on October 1 of each year and end on the 30th day of the next succeeding September.

This Code section reads as follows:

"Any municipality may by ordinance provide that the tax year for such municipality shall commence on the first day of October of each year and end on the thirtieth day of the next succeeding September, and provide for the effective date of such ordinance, and further provide that on and after the first day of each October after the effective date of such ordinance municipal taxes shall be based and due on state and county assessments for the preceding tax year, and shall be due and delinquent at the time when the state and county taxes for the preceding tax year are due and delinquent. All cities whose taxes were, prior to the adoption of this Code, assessed and collected under 1911 Acts, p. 130, or 1931 Acts, p. 337, shall continue under the provisions of this article without passage of any ordinance." (Emphasis Supplied.)

It is to be noted that any municipality which adopts the ordinance referred to in the above-quoted Code section accepts the provisions of said section. The pertinent part of this section, insofar as your inquiry is concerned, in regard to the municipal taxes here considered, is that said tax "shall be due and delinquent at the time when the state and county taxes for the preceding year are due and delinquent."

State and county taxes for the preceding tax year, which became a lien on the property located in your county as of October 1, 1946, will not be due and payable until October 1, 1947. It, therefore, follows that any municipal taxes which were levied after the first day of October, 1946, will be due and delinquent on October 1, 1947. In other words, in those municipalities which have adopted the ordinance as provided in Section 698, *supra*, municipal taxes are collected one year in advance and do not run a year behind as do State and county taxes.

You are, therefore, advised that in my opinion the district school tax referred to in your request, to be collected on all property located within the corporate limits of Phenix City, should be computed by you for the current year and will become due and delinquent on October 1, 1947.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 16, 1947.

Hon. Herman Thompson,
Commissioner of Public Safety,
1430 Arlington Avenue,
Bessemer, Alabama.

Municipalities—Attorneys.

The duties of a city attorney employed by a municipal corporation organized under a commission form of government in compliance with Title 37, Chapter 4, Article 1, Code of Alabama 1940, are a matter of contract between such city attorney and the city commission.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of July 8, 1947, is as follows:

"The City of Bessemer, Alabama, recently organized under the Commission form of Government in compliance with Title 37, Chapter 4, Article One of Code 1940, and are now operating thereunder, I am writing to request that you give me your opinion as to the duties of the City Attorney employed by the Commission, particularly as to his duties in prosecuting cases that are to be tried before the Recorder at his regular session of court.

"I would thank you very much for this information as soon as possible."

In answer to your request, you are advised that the duties of the City Attorney, employed by the City Commission of Bessemer, Alabama, are a matter of contract between such City Attorney and the City Commission of Bessemer. The fact that the city of Bessemer has recently organized under the commission form of government in compliance with Title 37, Chapter 4, Article 1, Code of Alabama 1940, would not alter or change the duties of the City Attorney.

Your attention is called to Title 37, Section 50, Code of Alabama 1940, wherein it is set out that the Commission, under the commission form of government, has absolute control and authority over its employees. Under the provisions of this section, the City Commissioner of Bessemer could, if it sees fit, impose on the City Attorney the duty to prosecute cases pending before the Recorder's Court. As to whether or not this duty has been imposed upon the City Attorney as one of the conditions of his employment, I am not advised.

I find no provision contained in Title 37, Chapter 4, Article 1, Code of Alabama 1940, which would impose this duty upon the City Attorney.

In fact, this chapter of the Code is absolutely silent as to any duties to be performed by any employees of the city.

As stated above, the duties of the City Attorney are a matter of contract between him and the City Commission; and, if he accepts the employment as City Attorney, he must perform the duties imposed upon him by the City Commission.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

September 16, 1947.

Hon. S. G. Johnson,
Judge of Probate,
Lamar County,
Vernon, Alabama.

Telephones—Telegraphs—Taxation—Counties—Exemptions—
Title 26, U. S. C. A., Sections 3465, 3466.

Counties are exempt from the payment of the Federal tax imposed on telephone and telegraph communications by Title 26, U. S. C. A., Section 3465.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, dated June 10, 1947, is as follows:

"We in operating and carrying on the county's business have to use long distance telephone and send telegrams from time to time, as would have to be done in operating and carrying on any business.

"We have considerable trouble with both telephone and telegraph agents about the federal tax on such long distance phone messages and telegrams.

"We have consistently refused to pay such tax on such messages, but when called upon to show cause and authority as to why, I am on the spot, and so far as I am able to find there has been no ruling by your office on the subject.

"If there has been an official ruling in the premises please refer me thereto, and if there hasn't been please give me an official opinion."

In answer to your request, you are advised that counties are exempt from the payment of the Federal tax imposed on long distance telephone and telegraph communications.

Title 26, U. S. C. A., Section 3465, imposes a Federal tax on telephone and telegraph communications. However, Title 26, U. S. C. A., Section 3466, provides in pertinent part as follows:

"No tax shall be imposed under section 3465 upon any payment received for services or facilities furnished to any State, Territory of the United States, or political subdivision thereof, *****"

It is to be noted from the above portion of Section 3466 that any State or political subdivision thereof is expressly exempt from the payment of the tax imposed by Section 3465, supra.

You are, therefore, advised that, since it is well-settled that counties are political subdivisions of the State of Alabama, they are not subject to the payment of this tax.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 17, 1947.

Hon. Roy E. Blair,
Tax Assessor,
Madison County,
Huntsville, Alabama.

Schools—District Tax.

1. Tax Assessors do not have authority to combine school tax districts even though the rate of levy and duration thereof are identical in such districts.

2. Authority to consolidate school tax districts is governed by Title 52, Section 264, et seq., Code of Alabama 1940.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

The request of your predecessor, Hon. George Darwin, for an official opinion, bearing date of April 29, 1947, is as follows:

"Please give me an opinion on the matter of combining all the several school districts of Madison County into two districts, namely, inside the municipality, and outside.

"The several districts at different times have voted upon themselves a 3 mill school tax, each one of which, runs until 1956. The schools in every district of the county run the same length term, that is, the elementary grades run nine months.

"I am confronted each year with the matter of separating all the property of the county into its several districts for school tax purposes. It seems now, as per the above explanation, that is a useless procedure, as well as a tedious one.

"I am anxious to know if these districts can be combined, and the method of procedure in so doing."

In answer to this request it is my opinion that you are not authorized to combine all of the several school districts of Madison County into two districts. Title 52, Section 272, Code of Alabama 1940, provides that the funds arising from the levy of a special tax for school purposes in any school tax district should be used for the exclusive benefit of the public schools of such district and it is prohibited to use such fund for the benefit of any other district. *City Board of Education v. Williams*, 231 Ala. 137, 163 So. 802; Biennial Report of Attorney General 1928-1930, page 1006; Biennial Report of Attorney General 1930-1932, page 10.

It is impossible for the funds collected from each school tax district to be segregated and used for the benefit of such district unless the property of the county is separated into several school tax districts for tax purposes.

The authority to consolidate school tax districts and the procedure thereof are provided in Title 52, Section 264, et seq., Code of Alabama 1940. This action must be instigated by the County Board of Education as provided in such section.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 17, 1947.

Hon. John G. Hosey, Chairman,
Jefferson County Board of Registrars,
102 Courthouse,
Birmingham 3, Alabama.

Title 17, Section 56, Code of Alabama 1940—Chairman of Board of Registrars of Jefferson County—Authority to contract for card index filing system.

1. Chairman of Board of Registrars of Jefferson County has authority to contract with International Business Machine Com-

pany to stamp and prepare filing cards when such inures to the benefit of the county by expediting and improving the filing system at reasonable expense.

2. Such expense must be borne by the County and not the State.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, under date of July 1, 1947, is as follows:

"In order to expedite and improve the service of this office, we have entered into a contract with the International Business Machine Company to prepare certain cards for our files, on which they will properly mark material information. By so marking the cards we will be able to more quickly and correctly file them and extract desired information from them.

"Sample of the cards which we desire to use is attached.

"All the information on these cards will be extracted from information on original records, which are and will be retained in this office. No original records will be sent out of this office, but it will be necessary for the International Business Machine office to have sample cards attached for the purpose of stamping them for filing. As stated, these cards do not constitute our original records. We would appreciate your advising us whether, under the law, we can permit the International Business Machine Company to stamp and prepare these cards at their office under contract with us. Of course, the cards will not officially constitute records of our office, or be considered as such until they are returned to us from the International Business Machine Company."

It is my opinion that the Chairman of the Board of Registrars of Jefferson County may contract with the International Business Machine Company to stamp and prepare filing cards when such cards are prepared at the direction of the Chairman of the Board of Registrars and are used as a part of an office filing system which expedites and improves the service of the office of the Board of Registrars.

Title 17, Section 56, Code of Alabama 1940, reads as follows:

"§ 56. Salary or compensation of board of registrars.—The chairman of the board of registrars in counties having a population of more than three hundred thousand, according to the last or any succeeding federal census, shall be furnished an office at the court house in such counties by the board of revenue, or board of like jurisdiction.

In such counties where there is more than one court house, the board of revenue, or board of like jurisdiction, shall determine at which court house the office of the chairman of the board of registrars shall be located. The chairman of the board of registrars shall have the power and authority to employ a chief clerk and such other clerical help as may be necessary for the efficient discharge of the duties of his office. The chief clerk shall be paid the same salary, in the same manner, as is paid to the other chief clerks in the several departments of the county, as fixed by the board of revenue, or board of like jurisdiction. The salaries of the said chief clerk and other clerical assistants shall be fixed by the board of revenue, or board of like jurisdiction. The chairman of the board of registrars shall receive a salary of three thousand dollars per annum, to be paid in twelve monthly payments, out of the funds of the county treasury, in the same manner as other county officers are paid. For each working day spent by the chairman of the board of registrars for the purpose of registering voters, the state shall pay the amount paid to the other registrars, said amount being in addition to the salary hereinabove stated, and in all such counties the duties, power and authority given to and required of the judges of probate by this article shall be conferred, done and performed by the chairman of the board of registrars."

This section provides that in counties coming within its scope (Jefferson County), the Chairman of the Board of Registrars shall have and exercise the duties, etc. that are placed upon the Judge of Probate by Title 17, Chapter 1, Article 3, Code of Alabama 1940. Consequently, in my opinion, the Chairman of the Board of Registrars must be allowed the same reasonable expenses, etc. necessary for the performance of those duties as are allowed when the duties are performed by the Judge of Probate. See *Quarterly Report of Attorney General*, Vol. 18, p. 213; *Quarterly Report of Attorney General*, Vol. 16, p. 117. Judges of Probate have been held by this office to be entitled to the clerical assistance necessary in the performance of their duties, etc. regarding the registration of voters. *Biennial Report of Attorney General*, 1936-38, p. 358. If the filing procedure indicated in fact inures to the benefit of the county by improving and expediting the work of the office of the Board of Registrars at a reasonable expense, a contract for such service is, in my opinion, therefore authorized.

It is specifically brought to your attention, however, that such expense must be borne by the county and not the State. Title 17, Section 37, Code of Alabama 1940, limits the obligation of the State to certain designated items of expense related to registration and only those items specifically designated are payable by the State. In construing this code section this office in *Biennial Report of Attorney General*, 1932-34, p. 262, rendered an opinion noting this limitation. Therefore, since the expense of preparing filing cards is not provided for in the statute the State cannot pay for such a service. On the other hand, in *Quarterly Report of Attorney General*, Vol. 16, p. 117, cited supra, this office held in effect that

the county governing body of Jefferson County must allow the Chairman of the Board of Registrars, out of county funds, reasonable expenses necessary for the performance of those duties ordinarily performed by the Judge of Probate in the registration and listing of voters but which, by Title 17, Section 56, Code of Alabama 1940, are placed upon the Chairman of the Board of Registrars of Jefferson County.

From the above, it is apparent that the costs of such a contractual service must be borne by the county and not the State, and you are herewith advised accordingly.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 17, 1947.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
106 Court House,
Birmingham 3, Alabama.

Department of Revenue—Boards of Equalization—Taxation—
Assessments—Tax Assessors.

Title 51, Sections 21, 53, 79, 80 and 131, Code of Alabama 1940.

1. Tax assessors have no power to assess as an escape improvements on land where the land has been assessed and the taxes paid thereon.

2. The county boards of equalization have no jurisdiction to set aside escape assessments made by the tax assessors, but such authority is vested in the department of revenue under Title 51, Section 131, Code of Alabama 1940.

3. Fraud vitiates all judgments and decrees in the concoction of which it enters, and same may be set aside by a court of equity.

Opinion by Assistant Attorney General Tiller.

Dear Sir:

Your request for an official opinion, bearing date of July 7, 1947, is as follows:

"In Re: Escape assessment made against the following property

in the name of Virginia I. Kirkpatrick, 2200 Clarendon Avenue, Bessemer, Alabama.

"Lots 3 to 8 also 19 to 26 Blk 2 Johnson City except part of Lots 3-4-25-26 Blk 2 now being used for H/W purposes as pt of Bham-Bess Super H/W.

"On January 22, 1947, the Chief Deputy Tax Assessor of the Bessemer Division of Jefferson County, discovered that the land as described above had been assessed for the tax years 1942 at \$1,525; 1943 at \$1,645; 1944 at \$1,645; 1945 at \$1,645; and 1946 at \$1,645. However, he determined that a number of tourist cabins, a restaurant, etc. had been built on this property, and had been on the property prior to the tax year 1942.

"He requested the Board of Equalization to make an inspection and give him a value on the improvements of this property, which the Board of Equalization did, and placed the assessment at \$16,500. Accordingly, on the 22nd of January 1947, Mr. McAdory made an escape assessment for the years 1942 to 1946, inclusive, of \$14,855, and for the tax year 1947 at \$16,500.

"In making this assessment he found that the property had been purchased by Mr. Kirkpatrick from E. M. Elliott, in whose name the property remained until he made the escape assessment.

"At that time he found from the records in the Probate Office, that on April 26, 1941, Mrs. Virginia I. Kirkpatrick had recorded a deed in Volume 260, Page 68, according to which she had purchased the property from her husband; the escape assessment being made in her name.

"Neither Mr. Kirkpatrick nor his wife had ever assessed the property, but had paid on it annually in the name of E. M. Elliott, from whom Mr. Kirkpatrick purchased the property.

"The Honorable Gerald Stone, attorney for Mr. and Mrs. Kirkpatrick, protested the assessment and its valuation, and the Board of Equalization heard the case. On July 1, they reduced the assessment as follows: tax years 1942, \$1,525; 1943, 1944, 1945, 1946 to \$1,645; for the tax year 1947, it was left at \$16,500.

"The Board of Equalization notified me on July 1 of this change of value. I call your attention to Title 51, Section 53 on page 666 of the 1940 Code which says, 'Whenever the tax assessor shall discover that any property has escaped taxation in any assessment within five years next preceding the current year, he shall list, return and value said property for assessment for the years during which same has escaped taxation. . .'

"I further call your attention to the foot-note on page 667, which reads as follows: 'It is the duty of the assessor to make "escape" assessments of any property not included in any assessment within five years next preceding the current year.'

"The law seems clear to me in this instance, and I believe that even though the Supreme Court has in every instance decided against escape assessments whenever any part of the land has been paid on, whether improvements are listed or not, it is my opinion that the Unit System law, which pertains only to Jefferson County, puts the burden on the taxpayer.

"I call your attention also to Title 51, Section 80, page 680 of the 1940 Code, which reads as follows: 'It shall be the duty of any owner of any real estate on which improvements have been made or on which improvements have been removed or destroyed or partially removed or destroyed during any taxable year to notify the tax assessor on or before December first of all such changes made subsequent to October first of the preceding year.'

"In order that I may decide whether or not to uphold the valuation for the preceding year to \$16,500 instead of the reduced valuation placed by the Board, I ask you to please advise me as quickly as possible whether or not I may require payment of taxes on the improvements to this land as made in the escape assessment above referred to.

"If it is the law that improvements placed on property, as described above, are not subject to escape assessments, then the Legislature should change the law.

"I might add further that the Deputy Assessor mailed to Mrs. Virginia I. Kirkpatrick by registered mail notice of the escape assessment, and has a receipt therefor.

"I believe we have complied with the law all the way, and ask that, if possible, you give this request for an opinion as much priority as you can conveniently allow."

The facts as stated by you are clear, and I will not here restate them. It appears that you desire to know whether or not the additional assessment (called by you an escape assessment) made by your chief deputy tax assessor of improvements on the above described real estate, and which improvements have not been listed along with the land, was a valid assessment that could be enforced.

It is my opinion that such assessment is not valid and, therefore, not enforceable.

Title 51, Section 21, Code of Alabama 1940, enumerates the subjects of taxation, and among these is the following:

"(a) Every piece, parcel, tract or lot of land in this state, including therein all things pertaining to such land, and all structures and other things so annexed or attached thereto as to pass to a vendee by conveyance of such land; * * * *."

Buildings or other improvements on land pass with a conveyance of the land to the vendee and are, therefore, regarded as a part of the land itself.

Title 51, Chapter 8, Code of Alabama 1940, provides for the assessing and collecting of taxes in counties having a population of two hundred thousand or more and consequently applies only to Jefferson County. This chapter provides for the "unit system" of assessments in which the "unit system" is defined as follows:

"'Unit system' of assessment shall mean the assessment of each lot or parcel of land, together with the improvements thereon, separately to the owner thereof." (Section 79) (Emphasis supplied)

Section 78 of said chapter contains similar language and is, in part, as follows:

"The purpose of this chapter is to * * * * assess each lot or parcel of land separately to the owner last assessing said property or to the owner of record and annually thereafter under a unit system of assessment of real property, by assessing each lot or parcel of land, together with the improvements thereon, separately, and determining the value and the amount of taxes on each separate item of property so assessed."

You will note that each of said sections uses the expression "together with the improvements thereon." This does not carry the idea that the improvements on the land are to be separately assessed, but rather that the improvements on the land are to be valued separately from the land in arriving at the reasonable fair market value of the land for the purpose of taxation. In other words, the land, together with the improvements thereon, constitute a unit for the purpose of taxation, although they must be valued separately, the tax being based upon the total assessed value of the land and the improvements.

Title 51, Section 80, Code of Alabama 1940, also provides, in part, as follows:

"In all counties now having, or which may hereafter have, a population of two hundred thousand, or more, * * * shall have the right and authority * * * to make a separate assessment of each lot or parcel of land, together with the improvements thereon, assessing the same to the party last assessing said property, as shown by the tax assessor's records in said county, or to the owner of record. The failure of said assessor to assess said property against the true owner of said property shall not invalidate said assessment. * * * It shall

be the duty of any owner of any real estate on which improvements have been made or on which improvements have been removed or destroyed or partially removed or destroyed during any taxable year to notify the tax assessor on or before December first of all such changes made subsequent to October first of the preceding tax year."

It will be observed that this section again uses the expression "together with the improvements thereon" and not "and the improvements thereon"; thus, I believe, clearly showing the legislative intent that the improvements, although valued separately, were to be assessed along with and as a part of the land. It might also be of interest to here note that the statute specifically provides that the assessment might be made either against the party last assessing the property, as shown by the tax assessor's records, or the assessment may be made to the owner of record. The assessment against either, it appears, would be valid; hence, the various assessments referred to in your letter as having been made against the former owner, E. M. Elliott, would be valid although the property during the time such assessments were made was actually owned by Mrs. Virginia I. Kirkpatrick—her ownership being evidenced by the recordation of the deed to her so that she was the record owner during the several years in question.

The above sections of Title 51 do not appear to be greatly different from the law which was in force on January 14, 1932, at the time the Supreme Court of this State handed down a decision in the case of *State v. Mortgage-Bond Co. of New York*, 224 Ala. 406, 140 So. 365. In that case, the question was stated to be as follows:

"Where real estate had been assessed by the owner, or by the tax assessor for previous tax years, not listing any improvements, and the taxes were paid as assessed, does the above act authorize an assessment of such improvements as escapes?"

This question was answered by the Court as follows:

"Under the law existing at the time of the passage of the above act, in making returns of real estate, the lands and the improvements thereon must be separately listed.

"This did not constitute the lands and improvements separate items of property, subject to distinct and separate tax liens. Indeed, the same statutes defined real estate as inclusive of all structures which would pass by a conveyance of the land.

"Listing the lands and improvements separately was in aid of fixing the tax valuation of the real estate as a whole. Clearly a sale of the lands for taxes would pass improvements, whether they were separately listed or not. *Beltona Coal & Mining Co. v. Hawkins*, 210 Ala. 359, 98 So. 26; *Delta Land & Timber Co. v. Police Jury*, 169 La. 537, 125 So. 585.

"Again: 'It is a principle of taxation that, where the state has once proceeded by its duly constituted agencies to the assessment and valuation of property, the determination is judicial in its nature, and conclusive in its results, unless impeached for fraud or want of jurisdiction, or reversed and set aside by some tribunal having authority to review. 37 Cyc. 1071.' *Anniston City Land Co. v. State*, 185 Ala. 482, 487, 64 So. 110, 111; *State v. Doster-Northington Drug Co.*, 196 Ala. 447, 71 So. 427; *Bower, Tax Collector, v. American Lumber & Export Co.*, 195 Ala. 572, 71 So. 100; *State ex rel. Davis v. Crane Co.*, 18 Ala. App. 194, 89 So. 901; *State Tax Commission v. Bailey & Howard*, 179 Ala. 620, 60 So. 913.

"From these authorities it is unquestioned law that a valid assessment, though irregular, and subject to correction through the various agencies set up to secure a fair and full assessment to the end that all taxable property shall bear its share of the public burden, when it becomes final and taxes are paid accordingly, the proceedings are binding on the state as well as upon the property owner, the tax lien is satisfied, the abstractor may so regard it.

"The property, and no part of it, can be regarded as an escape, or the property be re-assessed as an escape."

The act referred to in the above quotation was one which applied only to counties having a population of three hundred thousand or more and hence only to Jefferson County, and, in the main, provided that the deputy tax assessors "shall have the same power and authority as county tax assessors in the performance of their duty in the assessment of improvements on real property which have escaped taxation." However, this act was not in effect at the time the improvements in that suit had been omitted from the list of taxation, and the case was decided upon the general law of the state applicable at that time, which as stated hereinabove, appeared to be substantially the same as the general law on the subject today. The special act had no retroactive effect. Unfortunately, the act was not codified and brought forward into the Code of Alabama 1940 and this had the effect of repealing the act so that it is no longer of force and effect. Furthermore, the authority there conferred was upon deputy tax assessors with special appointments and not upon the tax assessors or their deputies or assistants. It is, therefore, doubtful that, had the law been brought forward without change, it would have conferred upon the tax assessor of Jefferson County or any other county the authority to assess as an escape the improvements on land which land had been listed for taxation and on which the taxes had been paid.

You also refer in your letter to Title 51, Section 53, Code of 1940, which section confers upon the tax assessor authority and power to assess all escape property which has not been listed and assessed for taxation. Said section, so far as here material, reads as follows:

"Whenever the tax assessor shall discover that any property has escaped taxation in any assessment within five years next preceding

the current year, he shall list, return and value said property for assessment for the years during which same has escaped taxation, * * * *."

This section further provides that the tax assessor shall give notice of such escape assessment and that, if the owner fails to protest, the assessment shall be made final on the 20th day after the mailing of such escape assessment; but that if the property owner has made objections to the assessment and the objections have been overruled and the assessment made final, the taxpayer may appeal from the assessment to the circuit court of the county in which the property is located. Thus, it clearly appears that the tax assessor, in assessing escape property, acts judicially, and the assessment he makes under the said circumstances is final and conclusive to the same extent that assessments are final and conclusive when made by the county boards of equalization; and I find no power in the law conferred upon such boards of equalization to set such escape assessment aside. This power would reside only in the department of revenue, under Title 51, Section 131, Code of Alabama 1940, provided the department of revenue set the assessment aside within the current tax year, or the same may be set aside by the circuit court on an appeal thereto by the taxpayer. However, the action of the board in attempting to set aside the alleged assessment made by the tax assessor is, in this case, immaterial for the reason that the assessment made by the tax assessor was itself void.

Section 53, *supra*, does not confer upon the tax assessor, or his deputy, authority to revalue or re-assess property, but only authority to assess all escape property omitted from some prior assessment list. Under the laws of this State, there are, for purposes of taxation, two classes of property—real and personal. When land and improvements thereon rest in the same ownership, the improvements, under Section 21, *supra*, are part of the real estate. In the case now before us, the land and improvements were, for the purposes of taxation, one parcel of real estate, and only one tax could be levied thereon. Such a tax was levied and paid by the owner. That the land and the improvements constituted one unit for the purposes of taxation was recently recognized by the Supreme Court of this State in the case of *State v. Bridges*, 246 Ala. 486, 21 So. (2d) 316, 159 A.L.R. 678, a case also originating in Jefferson County.

I am, therefore, of the opinion that the deputy tax assessor was without power to assess as an escape the improvements in question for the years 1942-1946, and that the escape assessment is, for that reason, void. It would be within the power of the legislature to confer upon the tax assessors of the State the authority to assess as an escape improvements which were not listed and valued along with the land; but, until the legislature has seen fit to do this, the tax assessors could not write that power into the law.

Fraud vitiates all actions in which it enters. In the quotation from the case of *State v. Mortgage-Bond Co. of New York*, *supra*, there is found this excerpt:

"It is the principle of taxation that, where the state has once proceeded by its duly constituted agencies to the assessment and valuation of property, the determination is judicial in its nature, and conclusive in its results, unless impeached for fraud or want of jurisdiction, or reversed and set aside by some tribunal having authority to review." (Emphasis supplied)

Section 80, *supra*, clearly makes it the duty of the owner of any real estate on which improvements have been made to notify the tax assessor on or before December first of the existence of all such improvements, assuming that the owner knew that the improvements had not been listed for taxation, and that the land was being assessed at a value not including the value of the improvements. Such failure to report the existence of such improvements and listing same for taxation would, in my opinion, constitute fraud; but in order for the State to take advantage thereof, it would, in my opinion, be necessary to file a suit in a court of equity to set aside the assessment on the ground of fraud. This would be a direct attack and not a collateral attack. Even solemn judgments and decrees of court may be set aside if fraud entered into the act of procuring the judgment or decree of in its concoction. *Miller v. Miller*, 234 Ala. 453, 175 So. 284; *Keenum v. Dodson*, 212 Ala. 146, 102 So. 230; *Bolden v. Sloss-Sheffield Steel & Iron Co.*, 215 Ala. 334, 110 So. 574.

This opinion is in conflict with the opinion of this office dated June 29, 1931, and reported in Biennial Report of Attorney General 1930-32, page 353. However, that opinion was rendered prior to the decision of the Supreme Court in the Mortgage-Bond Co. of New York case, *supra*, and of course, the opinion of the Supreme Court superseded said opinion.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 17, 1947.

Honorable Lecil Gray,
Judge of Probate,
Walker County,
Jasper, Alabama.

Courts—Jurisdiction—County Court of Walker County—Title 27, Section 1, Code of Alabama 1940—Act No. 429, Local Acts 1945, page 184.

1. Act No. 429, Local Acts 1945, page 184, confers upon the County Court of Walker County jurisdiction concurrent with that of the Probate Court of the county in the matter of the adoption of children.

2. A court is not ousted of the jurisdiction which it possesses over a subject by a subsequent legislative enactment conferring jurisdiction over the same subject on another court or other tribunal, unless such an intention is plainly manifested either by the words of the statute or by a necessary implication therefrom.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of June 9, 1947, is as follows:

"Please advise me whether or not the Probate Court of Walker County has any jurisdiction under H. 548, page 184, local acts, 1945 session, in adoption cases.

"Does this act confer jurisdiction to the County Court only, or is there concurrent jurisdiction between the County Court and the Probate Court?"

Under the provisions of Title 27, Section 1, Code of Alabama 1940, jurisdiction in the matter of the adoption of children is conferred upon the several probate courts of the State. This statute provides, in part, as follows:

"Any proper adult person, or husband and wife jointly, may petition the probate court of the county in which he or they have a legal residence, or of the county in which the child resides, or of the county in which the child had legal residence when it became a public charge, or of the county in which is located any agency or institution, operating under the laws of this state, having guardianship and custody of the child, for leave to adopt a child and for a change of the name of such child. * * * *"

By Act No. 429, Local Acts 1945, page 184, approved July 6, 1945, the Legislature made the following grant of jurisdiction and authority, with reference to the adoption of children, to the County Court of Walker County:

"Section 1. That all the jurisdiction, powers and duties now conferred upon the Probate Court of Walker County, Alabama, or the Judge thereof respectively, by the several provisions of Chapter 1 of Title 27 of the 1940 Code of Alabama, or by any other law of the State relating to the adoption of children, be and the same hereby are conferred or imposed upon the County Court of Walker County, Alabama, or the Judge thereof, respectively, the same as they now are or may hereafter be conferred or imposed upon the several Probate Courts of Alabama, or the Judges thereof, respectively.

"Section 2. For the additional duties hereby imposed upon such County Judge of Walker County, Alabama, he shall receive an additional salary of \$1,200.00 per annum, payable in twelve equal monthly installments on the first day of each month as other county officers are paid.

"Section 3. The Clerk of the Circuit Court, who is ex-officio Clerk of the County Court, shall keep all records of proceedings in adoption of children cases in the County Court of Walker County, Alabama, which are now required to be kept by the Judge of Probate of said county, and to record all papers, petitions and decrees now required to be recorded by the Probate Judge of said county, and shall receive the same fees and compensation as are now paid or allowed the Judge of Probate for same, payable and collected as now provided by law.

"Section 4. All laws or parts of laws in conflict with the provisions of this Act are hereby repealed.

"Section 5. This Act shall go into effect immediately upon its approval by the Governor."

You inquire as to whether such act confers upon the County Court of Walker County exclusive jurisdiction in the matter of the adoption of children, or whether such act grants to the County Court of Walker County jurisdiction and authority concurrent with that of the Probate Court of the county in such matters.

It is my opinion that Act No. 429, supra, confers upon the County Court of Walker County jurisdiction concurrent with that of the Probate Court of the county in the matter of the adoption of children.

Exclusive jurisdiction is defined as jurisdiction confined to a particular tribunal or grade of courts and possessed by it to the exclusion of all others, or jurisdiction possessed by a particular court to the exclusion not of all other courts but merely to the exclusion of other courts of the same grade; that jurisdiction which gives to one tribunal sole power to try the cause.

Concurrent or coordinate jurisdiction is that jurisdiction exercised by different courts at the same time over the same subject matter and within the same territory, and wherein litigants may in the first instance resort to either court indifferently, that of several different tribunals each authorized to deal with the same subject matter; and when a proceeding in respect of a certain subject matter can be brought in any one of several different courts, they are said to have concurrent jurisdiction. The term is usually applied to two or more courts, and concurrent jurisdiction may be briefly defined as "equal jurisdiction" or "same jurisdiction." 21 C. J. S., Courts, Section 18.

The controlling constitutional and statutory provisions govern the exclusive or concurrent jurisdiction of the various courts, and while jurisdiction may be divested by a repeal of the statute which conferred jurisdiction, in general jurisdiction once conferred is taken away only by express negative words or by irresistible implication from the terms of the statute. *Gould v. Hayes*, 19 Ala. 438. A court is not ousted of the jurisdiction which it possesses over a subject by a subsequent legislative enactment conferring jurisdiction over the same subject on another court or other tribunal, unless such an intention is plainly manifested either by the words of the statute or by a necessary implication therefrom. 21 C. J. S., Courts, Sections 92, 488 and 490.

There is nothing in the nature of jurisdiction, as applied to courts, which renders it exclusive. Jurisdiction is not a right or privilege belonging to a judge but is authority or power to do justice in a given case when it is brought before him; and the mere grant of jurisdiction to a particular court, without any words of exclusion, does not oust any other court of the powers which it before possessed. 14 American Jurisprudence, Courts, Section 244.

Inspection of the provisions of Act No. 429, *supra*, reveals that, while such act grants to the County Court of Walker County jurisdiction of those proceedings taken in the matter of the adoption of children, there is nothing therein specifically divesting the Probate Court of the county of the jurisdiction already possessed by such court in these matters.

Neither, in my opinion, is the Probate Court divested of such jurisdiction by "irresistible implication from the terms of the statute." There is nothing to be found within such act stating, or affirmatively implying, that the County Court of Walker County is to exercise such jurisdiction to the exclusion of the Probate Court of said county.

The fact that such act provides for the payment of additional compensation to both the judge and the clerk of the County Court for the performance of the new and additional duties imposed upon them by the granting of the new and additional jurisdiction to the court does not give rise to any inference that such jurisdiction is to be exercised, and such additional duties performed, to the exclusion of all other courts, including that court which has possessed such jurisdiction all the while.

The granting to the County Court of jurisdiction in the matter of the adoption of children constitutes a conferment upon that court of jurisdiction and authority entirely new and foreign to such court. In the exercise of such jurisdiction, new and additional duties are imposed upon both the judge and clerk of the court, for the performance of which additional compensation is granted. Under the decisions of our courts such is permissible. *Taylor et al. v. Davis et al.*, 212 Ala. 282, 102 So. 433. However, such action by the Legislature raises no presumption that the new jurisdiction granted is to be exercised to the exclusion of all other courts.

It is to be observed that Act No. 429, supra, in granting to the County Court of Walker County jurisdiction in the matter of the adoption of children, fails to make any provision with reference to the disposition of those cases concerning the adoption of children pending before the Probate Court of the county at the time of the approval of such act. This, in my opinion, is further evidence of the fact that it was the intent of the Legislature to grant to the County Court of Walker County concurrent, and not exclusive, jurisdiction in the matter of the adoption of children. Had the intent been to divest the Probate Court of all jurisdiction in such matters, with no provision being made as to the disposition of pending cases, such litigants would have been left without legal recourse. I have inspected numerous other local acts providing for the transfer of jurisdiction in certain causes from one court to another, and in all such instances proper provision is made within such act for the disposition of cases then pending within the court divested of jurisdiction. The absence of such provision from the act here in question, in my opinion, is material.

Premises considered, it is my opinion that Act No. 429, supra, grants to the County Court of Walker County jurisdiction concurrent with that of the Probate Court of the county in the matter of the adoption of children.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

September 17, 1947.

Honorable J. G. Kimbrough,
Probate Judge and Ex-Officio Chairman,
Court of County Commissioners,
Washington County.
Chatom, Alabama.

Statutes—Constitutionality—County—Road and Bridge Funds
—Title 62, Sections 14 and 15, Code of Alabama 1940—Constitution of Alabama 1901, Section 215.

Title 62, Section 15, Code of Alabama 1940, is unconstitutional and void insofar as it purports to authorize and empower county governing bodies of counties enumerated in Title 62, Section 14, Code of Alabama 1940, to transfer to the general fund of the county any portion of the proceeds of the special tax for further buildings, bridges, and roads levied under the authority of Constitution of Alabama 1901, Section 215.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of March 11, 1947, is as follows:

"Please refer to Article 5, Sections 14 and 15, Title 62, of the 1940 Code of Alabama, and particularly that part of Section 15 which empowers the governing bodies of Coosa, Cleburne, Clay, Washington and Winston counties to transfer any road and bridge funds, that were levied and collected within the county *** at any meeting of the governing body of the county in any calendar year, to the general fund, and advise whether or not said Article 5 is unconstitutional and void, due to the fact that the use of any of the special levy of $\frac{1}{4}$ of 1%, authorized under Section 215 of the Constitution for special purposes, for any other purpose or purposes other than for the purpose or purposes for which same were levied and collected, by transferring any part thereof to the general fund where it can be used for general purposes, would be doing indirectly what is prohibited doing directly under the provisions of said Section 215 of the Constitution, that is 'No county in this State shall be authorized to levy a greater rate of taxation, in any one year, on the value of the taxable property, therein, than one-half of 1%?'"

Title 62, Section 15, Code of Alabama 1940, which applies only to certain counties of the State, of which Washington County is one, reads as follows:

"Section 15. Transfer of road and bridge funds and fine and forfeiture fund to general fund.—The county governing body in each of such counties is authorized and empowered to transfer any road and bridge funds that were levied and collected within the county or any fine and forfeiture fund of the county at any meeting of said county governing body in any calendar year to the general fund of the county."

Constitution of Alabama 1901, Section 215, provides in pertinent part as follows:

"Section 215. **** provided, further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges, or roads, (a) any county may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

It is to be noted that the special tax authorized by the above quoted portion of this section must be applied exclusively to the purposes for which it is levied and collected, that is, for the payment of any debt or liability created for the erection of public buildings, bridges, or roads.

The clause "any road and bridge funds that were levied and collected within the county" used in Section 15, *supra*, could only apply to the

proceeds of a special tax levied pursuant to the authority granted by the above quoted portion of Section 215, supra, since there are no other road and bridge funds that are "levied and collected" within any county.

Consequently, it is my opinion that said section is violative of the above quoted portion of Section 215 of the Constitution, insofar as it attempts to authorize the transfer of the proceeds of the special tax levied and collected thereunder to the general fund of the county.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

September 17, 1947.

Hon. Asa Rountree, Jr.,
Director,

Alabama State Department of Aeronautics,
102 Church Street,
Montgomery 4, Alabama.

Act No. 367, General Acts 1945, p. 590, approved July 6, 1945—Act No. 402, General Acts 1945, p. 620, approved July 9, 1945—Amendment to Constitution of Alabama 1901, Section 93, ratified November 14, 1946—State Department of Aeronautics.

The Alabama Aeronautics Commission can allocate and appropriate funds to the Alabama Polytechnic Institute for airport construction, airport improvements, and development of other airport facilities.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of August 8, 1947, is as follows:

"Re: Eligibility of Alabama Polytechnic Institute to receive State grants for Airport Construction, Etc.

"The Alabama Polytechnic Institute owns and operates the Auburn-Opelika Airport.

"The Alabama Polytechnic Institute is a state institution; therefore the airport is state property.

"The Alabama Polytechnic Institute has applied to the Civil Aeronautics Administration for a federal airport grant to further improve its airport. It is an eligible applicant for a federal grant as per Subsection 'f' of Section 550.12, Regulations for Administering

Federal Airport Act. This request has been approved and a tentative grant allocated.

"The Alabama Polytechnic Institute, as a state agency, has applied to the Alabama Aeronautics Commission, also a state agency, for a state grant to assist in matching the federal grant. Federal funds must be matched dollar for dollar.

"The Alabama Aeronautics Commission has approved the application of the Alabama Polytechnic Institute and has also made a tentative allocation. However, there has been no disbursement of funds.

"The source of funds available to the Alabama Aeronautics Commission for allocation for airport projects is the aviation gasoline tax revenue.

"1945 Act 367 (the Aviation Gasoline tax amendment to Gasoline Tax Revenue Act) allocated a major portion of the aviation gasoline tax revenue to the State Department of Aeronautics for certain specified aeronautical purposes.

"Paragraph 1, Subsection 'C' of Section 1 of Act 367 specifies that this revenue shall be used as follows:

"The revenue arising from the sale of gasoline, as herein defined, for aviation fuel, shall be used exclusively for the purpose of paying the cost of acquiring, engineering, construction, improvement, and maintenance of existing or proposed airports and other air navigation facilities within the state, and for the further purpose of creating a sinking fund for the payment of the interest and the retirement of the principal of all bonds which may be hereafter lawfully issued, sold and delivered for funds to be used exclusively for enumerated purposes."

"This is to request your opinion on the following question:

"1. Can the Alabama Aeronautics Commission allocate and appropriate funds to the Alabama Polytechnic Institute for airport construction, airport improvements, etc.?"

"The State is empowered to engage in airport construction, improvement, etc. by authority of the Airport Constitutional Amendment, approved November 5, 1946, which amended Section 93 of the State Constitution, and reads as follows:

"When authorized by laws passed by the Legislature the state may engage in the construction, improvement, repairs and maintenance and operation of public airports, air landing fields and other air navigation facilities in the State of Alabama and may appropriate money or otherwise provide funds for this purpose."

"The 1945 Legislature also passed the laws necessary for the state to engage in airport construction, improvement, etc., as authorized by the Amendment.

"Act 402 (the Alabama Aeronautics Department Act, which also contains the enabling act for the Airport Constitutional Amendment) validates, in Subdivision 5, Section 8, powers dependent on ratification of Constitutional Amendment, as follows:

"'Provided that if the provisions of Section 6 and other sections of this act with reference to the ownership, control, establishment, construction, enlargement, improvement, maintenance, equipping, operating, regulating, and policing of airports, restricted landing areas and other air navigation facilities by the state violates Section 93 of the Constitution, the same shall be valid upon the ratification of an amendment to the Constitution authorizing the state to engage in such works of internal improvement.'

"Since the state is authorized to engage in airport construction, improvement, etc., the appropriation of funds by the Alabama Aeronautics Commission to the Alabama Polytechnic Institute for such purposes is simply the transfer of funds from one agency of the state government to another for the improvement of a state airport." My answer is in the affirmative.

The "Aviation Gasoline tax amendment" you refer to is Act No. 367, General Acts 1945, p. 590, approved July 6, 1945. This amendatory act allocates a major portion of the aviation gasoline tax revenue to the State Department of Aeronautics for development of aviation facilities as noted in the excerpt therefrom which you quote in your request for an opinion.

Similarly, the "Alabama Aeronautics Department Act" you refer to is Act No. 402, General Acts 1945, p. 620, approved July 9, 1945. This is the enabling act for the "Airport Constitutional Amendment," Section 8, Subdivision 5 of which you have also quoted in part in your request for an opinion.

The "Airport Constitutional Amendment" referred to was an amendment to the Constitution of Alabama 1901, Section 93, empowering the State to engage in works of internal improvement and to lend its money or credit in aid of the development of aviation facilities in the State of Alabama. This constitutional amendment was submitted to the voters on November 5, 1946, and proclaimed ratified on November 14, 1946, as indicated by Proclamation Record, Vol. "G," p. 130, now on file with the Secretary of State.

Your request for an opinion quotes correctly pertinent laws on this subject and, therefore, it is not deemed necessary to repeat such quotations. Suffice it to say, by virtue of the above noted laws, it is apparent

that proper legislation is on the statute books to enable the Alabama Department of Aeronautics to use funds derived from certain aviation gas tax revenue in the development of air facilities within the state.

By Section 3 of Act No. 402, *supra*, the Alabama Department of Aeronautics and the Alabama Aeronautics Commission were created. In Section 4 thereof, this Commission was given full power in the allocation of funds of the Alabama Department of Aeronautics. Subdivision 9 of this section is in part as follows:

"* * * * The Commission is empowered to expend any or all of the moneys allocated to or deposited in the State Aeronautics Department fund for the general promotion, advancement and safety of aeronautics and for airports or other aeronautical facilities or services in the State, which shall include the joint establishment or provision for such aeronautical facilities or services in cooperation with other State or Federal departments or with other political subdivisions of the State, separately or together."

Therefore, it clearly appears that the answer to your specific question is that the Alabama Aeronautics Commission can allocate and appropriate funds to the Alabama Polytechnic Institute for airport construction, airport improvements, etc.

Your conclusion, which I quote, is as follows:

"Since the state is authorized to engage in airport construction, improvement, etc., the appropriation of funds by the Alabama Aeronautics Commission to the Alabama Polytechnic Institute for such purposes is simply the transfer of funds from one agency of the state government to another for the improvement of a state airport."

It is my opinion that this conclusion is correctly stated, and you are herewith advised accordingly.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 17, 1947.

Hon. A. R. Meadows,
Superintendent,
State Department of Education,
Montgomery, Alabama.

Schools—State Textbook Committee—Act No. 412, General Acts 1945, page 647.

Under Act No. 412, General Acts 1945, page 647, approved July 7, 1945, members of the State Textbook Committee may be

paid ten dollars per day for the time they are actually engaged in their work, not to exceed forty (40) days in any fiscal year, regardless of whether or not such work is performed at regular meetings.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of March 19, 1947, is as follows:

"Section 2 e of Act No. 412, approved July 7, 1945, reads as follows:

"The members of the State Textbook Committee shall be paid the sum of ten dollars per day during the time they are engaged in such work, and in addition shall receive ten cents per mile for each mile travelled from their homes to the place of meeting and return, to be paid out of the Revolving Fund appropriated to the State Board of Education or from any other appropriation made for that purpose. Each member of the committee, before receiving per diem and transportation expenses, shall submit to the State Superintendent of Education a notarized statement of the number of miles travelled and the number of days engaged in such work; provided, however, that no member shall be paid for more than forty (40) days in any fiscal year. When it becomes necessary to pay out any funds in accordance with the provisions of this act, the State Superintendent of Education shall make requisition upon the Comptroller, who shall draw his warrant upon the Treasurer for the amount for which the requisition is made."

"Much of the work involved in the examination of textbooks submitted for adoption must be done by members of the State Textbook Committee outside the official meetings of the Committee. It is estimated that the minimum time spent by any member of the State Textbook Committee in this manner, since October 1, is equivalent to ten days of regular meetings of the Committee.

"In the light of statements made above, I will appreciate an official opinion from you regarding the legality of the payment to each member of the State Textbook Committee for ten days of work done outside and beyond the regular meetings."

In answer to your inquiry, it is my opinion that the members of the State Textbook Committee may be paid ten dollars per day for the time they are actually engaged in their work, not to exceed forty (40) days in any fiscal year, regardless of whether or not such work is performed at regular meetings.

Section 1 of Act No. 412, General Acts 1945, page 647, approved July 7, 1945, provides as follows:

"Section 1. There is hereby created a committee to be known as the State Textbook Committee. It shall be the duty of the said committee to consider the merit of textbooks offered for use in the tax-supported public elementary and high schools of the State and to make recommendations to the State Board of Education as hereinafter provided. In making such recommendations, said committee shall consider any recommendations made by the Committee on Courses of Study or by the State Superintendent of Education. The State Textbook Committee in its recommendations shall consider the advisability of staggering adoptions in order that expenditures for textbooks may be equalized from year to year in so far as practicable."

Subsections (d) and (e) of Section 2 of said Act reads as follows:

"(d) The State Textbook Committee hereby created shall meet annually in Montgomery, Alabama, on the date to be determined by the State Board of Education, provided that date shall not be later than October 15. At each annual meeting the State Textbook Committee shall organize by selecting one of its members to act as chairman of the said committee. The State Superintendent of Education shall be ex-officio secretary of the State Textbook Committee. Other necessary meetings may be held on dates to be determined by the State Textbook Committee subject to the approval of the State Superintendent of Education. The State Superintendent of Education shall notify the members of said committee of each meeting by registered mail at least one week prior to the time of such meeting.

"(e) The members of the State Textbook Committee shall be paid the sum of ten dollars per day during the time they are engaged in such work, and in addition shall receive ten cents per mile for each mile travelled from their homes to the place of meeting and return, to be paid out of the Revolving Fund appropriated to the State Board of Education or from any other appropriation made for that purpose. Each member of the committee, before receiving per diem and transportation expenses, shall submit to the State Superintendent of Education a notarized statement of the number of miles travelled and the number of days engaged in such work; provided, however, that no member shall be paid for more than forty (40) days in any fiscal year. When it becomes necessary to pay out any funds in accordance with the provisions of this act, the State Superintendent of Education shall make requisition upon the Comptroller, who shall draw his warrant upon the Treasurer for the amount for which the requisition is made." (Emphasis supplied)

The term "such work," as used in Subsection (e), *supra*, is not, in my opinion, limited to the work performed at the regular meetings of the Committee. It includes all work done by the members necessary to effectuate the purposes of the act. Some of the work is necessarily per-

formed at the regular meetings. Other parts of the work may be done at other times. The proposed textbooks are read by the members of the Committee before recommendations are made. This is a required part of their work. It would be unreasonable to hold that this individual reading must be done at regular meetings.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 17, 1947.

Hon. G. S. Davis, Chairman Pro Tem,
Court of Commissioners,
Marion County,
Hamilton, Alabama.

Counties—Court of County Commissioners—Gasoline Tax Warrants—Title 23, Section 43, Code of Alabama 1940—Title 51, Section 657, Code of Alabama 1940, as amended by Act No. 20, General Acts 1943, page 20.

1. County governing body, under the authority granted by Title 23, Section 43, Code of Alabama 1940, may procure from a banking company a sum of money to be used for the purchase of equipment for constructing and maintaining the public roads of the county, pledging as security therefor interest-bearing warrants issued by the county payable exclusively from the funds received by the county by virtue of Title 51, Section 657, Code of Alabama 1940, as amended.

2. Funds so obtained must be used exclusively for the purposes for which the funds so pledged could have been used, that is, construction and maintenance of the public roads of the county.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of March 31, 1947, is as follows:

"Will you please advise whether or not it is legal for a court of county commissioners to borrow money from a local banking company for the purchase of equipment to be used on building and maintaining county roads? This money would be borrowed from the bank at the rate of 4% interest with no other fees for the loan, placed in the gasoline fund account of the county, and a warrant written on such fund to pay for the equipment. The equipment, if

purchased on time and the carrying charge paid to the equipment company, the percentage rate would run approximately 17%. A sum of \$1,400.00 is involved and the carrying charge the equipment company would require would be \$223.00.

"It would be greatly appreciated if you would give us your opinion on this at an early date. Please advise what procedure can be followed in such a transaction if it is proper to borrow from the banking company."

Your inquiry is in two parts. You first inquire as to the authority of a county to "borrow," from a local banking company, a sum of money for the purpose of purchasing equipment to be used for the construction and maintenance of county roads. You state that the county is to pay an interest rate of 4% upon the sum borrowed.

My answer to this portion of your inquiry is in the affirmative, although, as will be pointed out later herein, perhaps "borrow" is not the proper term to apply to such transaction.

My conclusion in this regard is based upon the unlimited jurisdiction and powers of county governing bodies as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties as found set out in Title 23, Section 43, Code of Alabama 1940, which statute is as follows:

"§ 43. Powers of courts of county commissioners with regards to roads, bridges and ferries.—The courts of county commissioners, boards of revenue, or other like governing bodies of the several counties of this state have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial, and executive powers, except as limited in this chapter. Courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years."

You next request that I advise you as to the procedure to be followed

by you in securing such loan, in the event such transaction is held to be authorized.

It is my suggestion that such sum be procured by the issuance of what are commonly known as "gasoline warrants." Such warrants are creatures of judicial decision and are not expressly provided for by statute. They rest upon the "unlimited jurisdiction and powers" of county governing bodies "as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties." (Title 23, Section 43, *supra*.) They create no debt of the county payable from its general fund, but amount merely to a contract, or assignment, to pay certain sums of money in the future out of funds the county may receive from the State pursuant to the provisions of Title 51, Section 657, Code of Alabama 1940, as amended by Act No. 20, General Acts 1943, page 20, which act provides for the distribution to the several counties of a portion of the proceeds of the gasoline tax. Such funds must be used exclusively for the construction, maintenance, supervision and policing of the public roads and bridges of the respective counties.

An excellent discussion of such warrants will be found in the opinion of the Supreme Court rendered in the case of *Herbert v. Perry*, 235 Ala. 71, 177 So. 561, in which case it was held that a county's power to make a contract for maintenance and construction of public roads and bridges within the county is unlimited except for the fact that such contract must not exceed the period of time fixed by the statute, and furthermore that interest-bearing county warrants, payable out of the gasoline fund derived monthly from the State, may be issued for the construction and maintenance of the public highways. This holding was reaffirmed by the Supreme Court in the case of *Isbell v. Shelby County*, 235 Ala. 571, 180 So. 567, which held that a county has the right to issue interest-bearing warrants for highway construction purposes payable solely from the county's future allotment of State gasoline taxes and such warrants do not operate as a charge on the general credit of the county.—See also *Lyon v. Shelby County*, 235 Ala. 69, 177 So. 306.

In the *Isbell* case, *supra*, the court, in discussing these gasoline warrants, points out that the issuance of such warrants is not a borrowing of money, in a true sense, as the county has now allocated to it the funds to be received from the State as the county's share of the proceeds derived from the gasoline tax, such funds to be used for a definite purpose, the construction and maintenance of public roads. It has the expectancy of a continuation of such allocation, and that of consequence the fund will continue. Also, the county has the unquestioned right to contract for the construction and maintenance of public roads and to issue in payment therefor its interest-bearing warrants. Hence, these instruments are not warrants of the county in the true sense, but are merely evidences of transfer and pledge of a definite fund to their payment. Their issuance amounts, in effect, to a sale by the county of the anticipated revenue to be derived from the gasoline tax allocated by the State to the county for these purposes.

It has also been held by the Supreme Court that the county governing body has a right, in its sound judgment, to offer such warrants for sale at either public or private sale as may by such body be deemed to the best interest of the county.—*Burleson v. Court of County Commissioners of Marion County*, 235 Ala. 576, 180 So. 572.

Consequently, it is my suggestion that such sum be secured by the issuance to the banking company of county "gasoline warrants," pledging for the payment of such warrants the necessary portion of the funds to be received from the State as the county's share of the proceeds derived from the gasoline tax, being mindful of the fact that warrants secured by pledge of such anticipated funds and payable exclusively therefrom, are to be used only for such purposes as the funds so pledged may be used.—*Herbert v. Perry*, *supra*; *Isbell v. Shelby County*, *supra*; *Burleson v. Court of County Commissioners*, *supra*; and *Lyon v. Shelby County*, *supra*.

Former opinions of this office treating this subject and supporting the conclusion expressed herein may be found in *Quarterly Report of Attorney General*, Vol. 5, p. 32 (an opinion cited with approval by the Supreme Court in the *Isbell* case, *supra*), and *Quarterly Report of Attorney General*, Vol. 40, p. 29.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 17, 1947.

Hon. Tom C. Garner,
Judge of Probate,
Jefferson County,
113 Courthouse,
Birmingham 3, Alabama.

Deed Recording Tax—American National Red Cross—Probate Court—Title 51, Section 618, Code of Alabama 1940—

The American National Red Cross is subject to the recording tax upon deed levied by Title 51, Section 618, Code of Alabama 1940.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion, bearing date of July 22, 1947, is as follows:

"We have had offered for record in this office a deed made to the American National Red Cross. We would like to know if, in your

opinion, you think this deed should carry the regular deed tax on value of property conveyed. In other words, do you think the American National Red Cross is an agency of the Federal Government, and therefore, exempt from tax.

"We would appreciate your earliest attention to this matter, since we are holding up collecting the deed tax, pending your opinion."

In answer to your request, it is my opinion that the American National Red Cross is liable for the imposition of the deed tax levied by Title 51, Section 618, Code of Alabama 1940.

Although the American National Red Cross is organized and created by an Act of Congress, Title 36, U. S. C. A., Chapter 1, Sections 1 to 16, there is no provision exempting such corporation from state taxation. There may be a question as to its being a federal agency or instrumentality during time of war, and therefore exempt from state taxation, *Granzow v. U. S.*, 261 F. 172 (C. C. A. Iowa); but it does not appear that during peace time such corporation exercises the functions of a federal agency or instrumentality.

I have found no authority, either in the decisions of the courts or in the statutes, to the effect that in peace time the American National Red Cross is an agency or instrumentality of the federal government. There is no doubt that a federal agency or instrumentality is exempt from such recording tax. *Federal Land Bank v. Crossland*, 261 U. S. 374, 43 S. Ct. 385, 67 L. Ed. 703, 29 A. L. R. 1.

A charitable institution is subject to the filing tax of said section 618. *Biennial Report of Attorney General, 1934-36*, p. 480.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 17, 1947.

Hon. T. A. Braswell,
Chairman,
Barber Commission of Mobile County,
Mobile 15, Alabama.

Licenses—Barbers—Veterans—Exemptions—Mobile County—

Title 51, Article 14, (Sections 852-864), Code of Alabama 1940, as amended by Act No. 564, General Acts 1943, Page 562, and Act No. 366, General Acts 1945, page 589—Act No. 353, General Acts 1945, page 570—Act No. 290, Local Acts 1935, page 180, as amended by Act No. 61, Local Acts 1945, page 53.

Veterans' exemptions granted under Title 51, Article 14 (Sections 852-864, Code of Alabama 1940, as amended by Act No. 562, General Acts of 1943, page 562, approved July 10, 1943, and Act No. 366, General Acts 1945, page 589, approved July 9, 1945, and under Act No. 353, General Acts 1945, page 570, approved July 6, 1945, are applicable to barbers' license fees in Mobile County provided for in Act No. 290, Local Acts 1935, page 180, approved September 2, 1935, as amended by Act No. 61, Local Acts 1945, page 53, approved June 1, 1945.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of June 25, 1947, is as follows:

"We saw some few weeks ago where you ruled that world war veterans are exempt from occupational license under the 1945 Legislative Act. We have in Mobile County a Barber License Law, Act of the Legislative of 1935, creating a Barber Commission, etc., for Mobile County, Alabama, or any other County that so desired same. A fee of (\$7.50) a year is assessed each Barber in the County for a license. The receipts from this at the present is not sufficient to carry on the work, as we have to carry on without compensation the last few weeks of each year.

"We have so many G-I boys that we have been trying to help by placing them in shops as Apprentice etc., and if we cannot collect the (\$7.50) fee, we will not be able financially to carry on the work from a sanitary standpoint as it should be.

"We have quite a lot of expenses connected with the enforcement of this law, and we can truthfully say it has been the salvation of the Barbers as well as making our shops a sanitary place where the public may enter. The Barbers of this County are really sold on our law, and we hope we will not from a lack of funds ever have to sacrifice this law.

"Please inform us at your earliest convenience if your ruling a few weeks ago applies to privilege license, such as we issue the Barbers."

In answer to your inquiry, it is my opinion that the veterans' exemptions in regard to occupational and business licenses granted under the provisions of Title 51, Article 14, (Sections 852-864), Code of Alabama 1940, as amended by Act No. 564, General Acts 1943, page 562, approved July 10, 1943, and Act No. 366, General Acts 1945, page 589, approved July 5, 1945, (Title 51, Sections 852, 853, 854, 855 and 864, 1945 Cumula-

tive Pocket Part, Code of Alabama 1940), and under the provisions of Act No. 353, General Acts 1945, page 570, approved July 6, 1945 (Title 51, Sections 864 (1)-(8), 1945. Cumulative Pocket Part, Code of Alabama 1940), are applicable to the barber's license fee in Mobile County provided for in Act No. 290, Local Acts 1935, page 180, approved September 2, 1935, as amended by Act No. 61, Local Acts 1945, page 53, approved June 1, 1945.

Both of the veterans' exemption laws, above referred to, allow veterans (who come within the purview thereof) certain exemptions with regard to the payment of business or occupational license taxes. The barber's license fee in Mobile County provided for in the above referred to local acts, in my judgment, is such a business or occupational license tax as to come within the meaning of these veterans' exemption laws. This conclusion is in accordance with the former opinions of this office relating to kindred matters; namely, license fees for plumbers under regulatory acts and license fees required under the Milk Control Act.—Cf. Quarterly Report of Attorney General, Vol. 24, p. 7; Quarterly Report of Attorney General, Vol. 2, p. 229; Quarterly Report of Attorney General, Vol. 7, p. 118.

For a full discussion of the application of the veterans' exemption laws in general, your attention is invited to Quarterly Report of Attorney General, Vol. 40, p. 50.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 18, 1947.

Mr. Owen Alford, Member,
Winston County Highway Board,
Houston, Alabama.

Counties—Courts of County Commissioners—Winston County—Act No. 333, Local Acts 1939, page 221.

The Highway Board of Winston County is without authority to pay the secretary treasurer of said board an amount in excess of \$75.00 per month as compensation for his services.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of September 9, 1947, is as follows:

"The salary of Sec'y-Treasurer of Winston County Highway Board was set up eight years ago at seventy-five dollars (\$75.00) when it was only a part time job.

"We have a Farm-to-Market Program in our county which makes the work more than double what it was when the salary was set. Could we, members of the board, pay him in addition to this salary for the extra work? We have a very good secretary and treasurer, but he says he is resigning September 15, unless there can be some arrangement made.

"I think it will be nearly impossible for the board to get a qualified man at this price, which calls for full time work at only seventy-five dollars (\$75.00) per month.

"I will appreciate your advice on this matter at the earliest possible date."

The Highway Board of Winston County was created, and its powers and duties defined by Act No. 333, Local Acts 1939, page 221. Section 4 of this Act provides in part as follows:

"The Highway Board shall elect and appoint a Secretary of the Board who shall act as secretary at all meetings and the Board shall procure permanent, well-bound books similar to those provided for the minutes of the Court of County Commissioners in which the Secretary shall, under the direction of the Chairman of said Board, record all acts of the Highway Board, and the filing of all claims, auditing the same and the allowance thereof shall be in the same manner as now provided by law as to Courts of County Commissioners. The secretary of said Board shall also act as the Treasurer of said Board and for the services rendered in such capacity and as Secretary shall receive not more than \$75.00 per month to be paid from the same funds and in the same manner as is provided in this Act for the payment of the compensation of the members of the Highway Board. * * *"

The Highway Board of Winston County may exercise only such powers as are expressly granted to it by Act No. 333, and such additional powers as may be necessary for the exercise of its express powers where the Act has not specifically provided a mode or manner of exercising the express powers.

In view of the express provision of Section 4, supra, that the secretary-treasurer of the board shall receive for his services "not more than \$75.00 per month," it is my opinion that the Highway Board of Winston County is without authority to pay him any additional amount above the \$75.00 per month for "extra work." The fact that more time is now required to perform his duties as the secretary-treasurer of the board than at the time he was employed has no bearing on the question.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 18, 1947.

Hon. J. G. Kimbrough, Chairman,
County Court of Commissioners,
Washington County,
Chatom, Alabama.

Counties—Courts of County Commissioners—Funds—Title 23,
Section 47, Code of Alabama 1940.

1. Court of County Commissioners of Washington County may legally transfer surplus funds from the general fund to the road and bridge fund when there is sufficient money after such transfer to pay all prior obligations to which the general fund is subject at the time of transfer.

2. Whether or not there is such a surplus in the general fund is a question of fact to be determined by correct accounting.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of July 18, 1947, is as follows:

"Section 15, Title 62, Code of Alabama 1940, authorizes the Court of County Commissioners of Washington County to transfer any road and bridge funds that were levied and collected within the county or any fine and forfeiture fund of the county to the General Fund of the county.

"From time to time since this act became law the Court of County Commissioners of this county has transferred funds from the road and bridge fund to the general fund of the County. The general fund now has a large surplus in it as a result of these transfers and the Court of County Commissioners want to know if they can legally transfer the fund back to the road and bridge fund."

My answer is in the affirmative subject to certain qualifying conditions hereinafter discussed.

The general law as set forth at Title 23, Section 47, Code of Alabama, reads as follows:

"The court of county commissioners, board of revenue, or other like governing body of any county in this state may transfer to the road fund of the county any surplus of the general funds of the

county in the county treasury, or any part of such surplus whenever, in the judgment of such court or board, it will promote the interest of the county to make such transfer. Any surplus of the general fund so transferred shall be used only for the working of the public roads or the building of bridges or otherwise improving the roads of such counties."

This office in an opinion found in Quarterly Report of Attorney General, Vol. 38, p. 35, held that under the above cited code section a county governing body may transfer moneys from the general fund to the road and bridge fund, provided there is at the time of transfer a surplus in the general fund.

Whether or not there is such a surplus is a matter of accounting and a matter of fact as to which, however, the following rule has been laid down in *Rhodes v. Marengo County Bank*, 205 Ala. 667, 88 So. 850, to-wit:

"While Act Sept. 22, 1915 (Laws 1915, p. 573), authorizes the transfer of any surplus of the general fund to road fund, a transfer of a portion of the general fund to the road fund cannot be justified under that act, where the county was much indebted, and there were warrants having priority unpaid."

With reference to this test, this office in Quarterly Report of Attorney General, Vol. 16, p. 262, held as follows:

"The above simply means that you cannot make such a transfer from the general fund to the road and bridge fund of your county where by so doing you are likely to impair the general fund to such an extent that warrants having priority could not be paid. In other words, there cannot be said to be a surplus in the general fund until all preferred claims against the county, and all appropriations which the law makes mandatory have been paid, or adequate funds are on hand sufficient to meet all preferred claims. After this has been done, if a surplus remains, the court of county commissioners may lawfully transfer any such surplus to the road fund to be used as provided by law. See Biennial Report of Attorney General, 1930-32, p. 446; *Ramage Park & Co. v. Parks* (sic), 214 Ala. 661, 108 So. 580."

By virtue of the authorities noted, it is my opinion that the Court of County Commissioners may legally transfer funds from the general fund of the county to the road and bridge fund under the conditions stated.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 18, 1947.

Hon. Haygood Paterson,
Commissioner of Agriculture,
Department of Agriculture and Industries,
CAPITOL.

Gasoline—Kerosene—Inspection Fees—Department of Agriculture and Industries—Taxation—Exemptions—Title 2, Sections 34, 343, 344, 433, 434, Articles 21 and 26, Code of Alabama 1940.

1. Gasoline inspection fee required by Title 2, Section 433, Code of Alabama 1940, not a tax, but a service charge.

2. Kerosene inspection fee required by Title 2, Section 343, Code of Alabama 1940, not a tax, but a service charge.

3. Sale of gasoline or kerosene by oil company to State Agency not exempt from gasoline or kerosene inspection fees.

4. Gasoline and kerosene inspection fees required to be paid by seller, and it is immaterial whether or not purchaser is a State agency.

5. Gasoline and kerosene inspection fees required to be paid by seller not subject to general rule excluding State agencies from taxation.

6. When an inspection fee is not a tax and is required to be paid by vendor, rule implying governmental immunity from taxation is not applicable, even though State agency is vendee.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of April 24, 1947, is as follows:

"We have recently received reports from various oil companies throughout the State of Alabama showing that they have made sales of gasoline and kerosene to State Departments such as Highway Department, Convict Department, etc. and they report these sales as exempt from the Department of Agriculture & Industries Gasoline and Kerosene Inspection Fees.

"We have not attempted collection of these fees from the oil companies involved as we are in doubt whether or not State Departments are subject to pay the inspection fees. Your opinion in regard to this matter will be appreciated."

You are advised that oil companies selling gasoline or kerosene to State departments, such as the Highway Department, Department of Corrections and Institutions, and others, are not exempt from the payment of the inspection fee on kerosene and gasoline.

The inspection fee on kerosene is provided for in Title 2, Section 343, Code of Alabama 1940, which is as follows:

"§ 343. Inspection fee.—For the purposes of this article, an inspection fee of one-half of one cent for each gallon of kerosene sold in or for importation into the state, shall be paid to the commissioner of agriculture and industries on or before the twentieth day of each month on all of said products so sold or imported during the preceding month and each remittance shall be accompanied by a certificate stating that the amount remitted is correct and that the kerosene so sold or imported was of legal standard. Said inspection fee herein provided shall be paid but once on the same product, but for failure on the part of any person, firm or corporation to make the payment herein provided for on or before the twentieth day of each month, the commissioner of agriculture and industries shall be and is hereby authorized to add ten percent to the amount of such inspection fees already due as a penalty for the failure of such person, firm or corporation to make such report and payment on the date herein provided, and shall proceed to collect such inspection fees, together with all costs incident to such inspection, including the penalty. It shall be the duty of the person, firm or corporation first selling in or for importation into this state kerosene to pay said inspection fee, provided if such person, firm or corporation fails to pay said inspection fee, the commissioner shall require the payment of said fees from such other person, firm or corporation as may receive kerosene upon which the inspection fee has not been paid. The inspection fees shall constitute and operate as a lien, at all times until paid, upon any kerosene sold or offered for sale in or imported into this State and shall be enforceable immediately when due, by the commissioner in the same manner as tax liens of the state upon personal property of a delinquent taxpayer are enforceable."

The inspection fee on gasoline (and other liquid motor fuels) is provided for in Title 2, Section 433, Code of Alabama 1940, which is as follows:

"§ 433. Inspection fee.—For the purposes of this subdivision, an inspection fee of one-fortieth of one cent for each gallon of gasoline, benzine, naphtha, or other liquid motor fuel, sold or offered for sale in or for importation into the state, shall be paid to the commissioner of agriculture and industries on or before the twentieth day of each month on all of said products so sold during the preceding calendar month and each remittance shall be accompanied by a certificate stating that the amount remitted is correct and that the gasoline, benzine, naphtha, or other liquid motor fuel so sold was of legal standard. Said inspection fee herein provided shall be paid but once

on the same product, but for failure on the part of any person, firm or corporation to make the payment herein provided for on or before the twentieth day of each month, the commissioner of agriculture and industries shall be and is hereby authorized to add ten percent to the amount of such inspection fees already due as a penalty for the failure of such person, firm or corporation to make such report and payment on the date herein provided and shall proceed to collect such inspection fees, together with all costs incident to such inspection, including the penalty. It shall be the duty of the person, firm or corporation first selling in or for importation into this state gasoline, benzine, naphtha or other liquid motor fuels to pay said inspection fee, provided if such person, firm or corporation fails to pay said inspection fee, the commissioner shall require the payment of said fees from such other person, firm or corporation as may receive gasoline, benzine, naphtha, or other liquid motor fuel upon which the inspection fee has not been paid. The inspection fees shall constitute and operate as a lien, at all times until paid, upon any gasoline, benzine, naphtha or other liquid motor fuel sold or offered for sale in or imported into this state and shall be enforceable immediately when due, by the commissioner in the same manner as tax liens of the state upon personal property of a delinquent taxpayer are enforceable."

It is a general rule that when a tax is laid in general terms with nothing to indicate that it was intended to apply to a city or county, or agency of the state, it will be held not to apply to those governmental agencies. *State v. City of Montgomery*, 228 Ala. 93, 151 So. 856; *City of Birmingham v. State*, 233 Ala. 138, 170 So. 64.

In my opinion, the general rule where an exemption from taxation is implied in favor of a governmental agency, excluding that governmental agency from taxation, is not applicable to the case presented by your inquiry.

In the first place, the amount required to be paid by Title 2, Sections 343 and 433, Code of Alabama 1940, is not a tax. It was stated in the case of *Pure Oil Company v. State*, 244 Ala. 258, 12 So. 2d 861, that this inspection fee is "in the nature of a service charge to meet expenses of inspection, etc., for the protection of the public." In this case, the court was speaking of the inspection fee required to be paid on kerosene, but the statement is also applicable to the inspection fee required to be paid on gasoline. Title 2, Sections 343 and 433, Code of Alabama 1940. It has been held by an opinion of this office rendered November 7, 1934, that the gasoline inspection fee is not a revenue measure. Biennial Report of Attorney General, 1934-36, pages 24, 25.

When the inspection fee on gasoline and kerosene is collected as provided for in Title 2, Sections 343 and 433, Code of Alabama 1940, such fee is required to be paid into the agricultural fund. Title 2, Sections 344 and 434, Code of Alabama 1940. Such fund is expended for the

regulatory control and administrative work of the Department of Agriculture and Industries. Title 2, Section 34, Code of Alabama 1940. This control and regulatory work includes the inspection, regulation, and control of gasoline and kerosene. Title 2, Articles 21 and 26, Code of Alabama 1940.

It is my conclusion that since the amount required to be paid on gasoline and kerosene by the provisions of Title 2, Sections 343 and 433, Code of Alabama 1940, is not a tax but rather a service charge, the general rule implying an immunity from taxation in favor of governmental instrumentalities is not applicable.

As a further and independent reason supporting my conclusion that the gasoline and kerosene inspection fee must be paid, even though the sale of such products is made to a State department or agency, it is my opinion that the fee is, by the express terms of the statutes, required to be paid by the seller or importer, and it is immaterial who is the purchaser. Title 2, Sections 343 and 433, Code of Alabama 1940. These Sections provide in part:

"It shall be the duty of the person, firm or corporation first selling in or for importation into this State kerosene to pay said inspection fee,"

"It shall be the duty of the person, firm, or corporation first selling in or for importation into this State gasoline . . . to pay said inspection fee,"

In the situation outlined in your inquiry, the sellers are private oil companies. The fees are required to be paid by these oil companies, and not by their vendees, which in this case are State departments or agencies. Even if the gasoline or kerosene inspection fees are considered a tax, there would be no immunity because the tax is levied on the seller and not on the purchasers.

In the case of *State v. City of Montgomery*, *supra*, it was stated:

"The general rule is that when a tax levy is laid in general terms with nothing to indicate that it was intended to apply to a city or county, it will be held not so to apply. . . . There is no infringement of this principle to hold that when a city buys gasoline from a dealer who is subject to the tax, the amount of it should not be deducted. The tax is imposed on the dealer and not on the city in that transaction, though it incidentally is paid in the amount of the purchase price. *Orange State Oil Co. v. Amos*, 100 Fla. 884, 130 So. 707."

In an opinion of this office, Biennial Report of Attorney General, 1934-36, page 24, which discusses the gasoline inspection fee, it was stated:

"Also, the fact that the buyer and direct consumer is exempt from taxation is immaterial. The inspection fee, which is not a revenue

measure, is paid by the seller and not by the buyer or consumer. The fact that the buyer or consumer is not subject to taxation does not exempt the seller from the payment of the fee in question.—Opinions of Attorney General, Book 14, p. 300 (Off. Ed.).”

The opinion cited in the above quotation held that when the Convict Department purchased fertilizer, the seller was not for that reason exempt from the payment of the fertilizer tag tax.

It has further been held by an opinion of this office rendered August 21, 1937, Biennial Report of Attorney General, 1936-38, page 344, that sales of gasoline to counties and municipalities are not exempt from the gasoline inspection fee. This opinion further holds that the implied exemption from taxation in favor of cities and counties is not applicable to the gasoline inspection fee. In my opinion, the reasoning in the opinion last cited is applicable to your inquiry and in cases of sales to agencies of the State of Alabama.

You are advised, therefore, that when oil companies sell gasoline and kerosene to State agencies, such oil companies are required to pay the inspection fee provided for in Title 2, Sections 343 and 433, Code of Alabama 1940.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

September 18, 1947.

Hon. Herman K. Longshore,
Judge of Probate,
Lauderdale County,
Florence, Alabama.

Solicitors—Law and Equity Court, Lauderdale County—Local Acts 1931, p. 72—Act No. 62, Local Acts 1947—Title 13, Section 256, Code of Alabama 1940—Constitution of Alabama 1901, Sections 68 and 281.

Act No. 62, Local Acts 1947, violates Constitution of Alabama 1901, Sections 68 and 281, in attempting to increase the salary of the solicitor of the Law and Equity Court of Lauderdale County during his existing term of office without substantially increasing the duties of such officer.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of July 28, 1947, is as follows:

"By an Act H-203 approved July 7, 1947, entitled an Act to amend Section 1, 6, 8 and 28 of an Act entitled an Act to establish a Law and Equity Court for Lauderdale County, etc., approved May 29, 1931, the salary of the Solicitor of said Law and Equity Court was increased from \$1800.00 per annum to \$2500.00 per annum. The additional duties which said Solicitor is required to perform by said amended Act is:

"1. That in capital cases, arson and burglary, bastardy proceedings and cases of driving while intoxicated, where preliminary hearings are had before Justices of Peace in Lauderdale County, where application is made to the Judge of the Law and Equity Court or to the Circuit Judge requesting the services of the Solicitor of the Law and Equity Court in the prosecution of said preliminary hearings, the application to be signed by the Sheriff of the County, the Judge to whom application is made may direct said Solicitor to assist in such prosecution of said preliminary hearings.

"2. That said Solicitor by said amendment shall not defend any person charged with crime in any of the Criminal Courts of Lauderdale County or in any of the Courts of the State of Alabama, whereas the original Act only prohibited said Solicitor from defending any person charged with crime in any of the Criminal Courts of Lauderdale County.

"We note that the cases of *Tayloe vs. Davis*, 102 So. 433; *Jackson vs. Sherrod*, 92 So. 381; *State vs. Henry*, 139 So. 278; *Morgan County vs. Edmondson*, 192 So. 274 hold that for a new and additional duties of encumbent of a public office may be awarded extra compensation without a violation of Section 281, Article 17 of the Constitution of Alabama. The Board of County Commissioners of Lauderdale County and the Judge of Probate of said County desire to know whether or not this Act took effect immediately upon approval insofar as the Solicitor's raise in salary is concerned and whether or not the County of Lauderdale can legally pay to the Solicitor of the Law and Equity Court, the increased salary during his present term of office."

The act creating the Law and Equity Court of Lauderdale County, Alabama, was passed over the Governor's veto and became effective on May 29, 1931. This act is found in Local Acts 1931, page 72. Section 9 of this act prescribes the duties of the solicitor of the Law and Equity Court of Lauderdale County and provides that the duties of the solicitor of said Law and Equity Court shall be the same as now provided by law for "Deputy County Solicitors."

Title 13, Section 256, Code of Alabama 1940, provides for the appointment, by the circuit solicitor, of a deputy solicitor in each county of his circuit, and prescribes the duties of persons so appointed as deputy solicitor. This section is as follows:

"Section 256. Deputy solicitors appointed; removal.—The several circuit solicitors, except as otherwise provided by law, shall appoint a deputy solicitor in each county of his circuit, to represent the state in all cases in the county court and inferior courts, and all preliminary proceedings, applications for bail and habeas corpus proceedings in all courts, aid or act for the circuit solicitor before the grand jury and in all matters in the circuit court when requested to do so by the circuit solicitor, and perform all the duties of the circuit solicitor in his absence when so directed by the circuit solicitor, and such deputies may be removed by the circuit solicitor at pleasure."

There are numerous other duties prescribed by the general laws of the State with reference to solicitors by whatever name called. See Title 13, Section 229, Code of Alabama 1940.

For the duties required of the solicitor of the Law and Equity Court of Lauderdale County, his compensation was fixed at \$1800.00 per annum. See Section 8 of the 1931 Local Act, *supra*.

Act No. 62, Local Acts 1947, approved July 7, 1947, amends Sections 1, 6, 8, 14 and 28 of the act creating the Law and Equity Court of Lauderdale County. Section 3 of Act No. 62, *supra*, amends Section 8 of the original act, *supra*, to read as follows:

"Section 8. That there shall be a solicitor of and for said Law and Equity Court of Lauderdale County, who shall be appointed by the Governor immediately after the approval of this Act, and who shall hold office until the second Tuesday after the first Monday in January, 1935, and until his successor is elected and qualified, and shall prosecute for the State all causes in said Court and for so doing he shall receive a salary of Twenty-Five Hundred Dollars per year, payable Two Hundred, Eight and 33/100 Dollars per month out of the County Treasury on warrants to be drawn by the Judge of said Court, at the end of the month, or semi-monthly at the election of said Solicitor. That in the absence of the said Solicitor, the Judge of said Court may appoint a special deputy solicitor to represent the State in cases that the Solicitor of said Court is required to represent the State and shall receive for his compensation not less than \$10.00 nor more than \$25.00 at the discretion of the Judge, for each day or fraction thereof, for the time actually appointed. Said Solicitor shall begin upon the approval of this Act and at the general election in 1934 and every four years thereafter there shall be elected a solicitor for said Law and Equity Court of Lauderdale County, by the qualified electors of said County. That said solicitor shall be a qualified elector of Lauderdale County and shall be learned in the law and said solicitor shall not defend any person charged with crime in any of the criminal courts of Lauderdale County, or in any of the Courts of the State of Alabama; that in Capital Cases, Arson and burglary, Bastardy Proceedings and cases of Driving While Intoxicated, where preliminary hearings are had before Justices of the

Peace in Lauderdale County, where application is made to the Judge of the Law and Equity Court or to the Circuit Judge, requesting the services of the Solicitor of the Law and Equity Court in the prosecution of said preliminary hearings, the application to be signed by the sheriff of the County, the Judge to whom application is made may direct said solicitor to assist in such prosecution of said preliminary hearings."

The above quoted section attempts to confer new and additional duties upon the solicitor of the Law and Equity Court of Lauderdale County, and for such new and additional duties, attempts to increase his annual salary from \$1800.00 to \$2500.00. The material changes in the amendatory act, looking toward new and additional duties as far as the solicitor is concerned, are to the effect that he is prohibited from defending any person charged with crime in any of the criminal courts of Lauderdale County, or in any of the Courts of the State of Alabama, and that in capital cases, arson, and burglary, bastardy proceedings and cases of driving while intoxicated where preliminary hearings are had before the Justices of the Peace in Lauderdale County, he is to assist in the prosecution of such cases and hearings when his services are requested by the sheriff of the county and when he is so directed by the Judge of the Law and Equity Court of Lauderdale County.

It must be pointed out that Section 8 of the original act creating the Law and Equity Court of Lauderdale County, *supra*, did not prescribe the duties of the solicitor of said court. As above noted, these duties of the solicitor of the Law and Equity Court of Lauderdale County are prescribed by Section 9 of the original act. The amendatory act does not mention Section 9 of the original act.

A grave constitutional question is presented by your inquiry, and I shall forthwith proceed to deal with it.

The Supreme Court of Alabama in *In Re Opinions of the Justices*, 225 Ala. 502, 144 So. 111, said, "That which is forbidden directly cannot be done indirectly, and the law abhors evasions and subterfuges."

Section 281 of the Constitution of 1901 provides:

"The salary, fees or compensation of any officer holding any civil office of profit under this State or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

The Supreme Court of Alabama in the case of *Tayloe v. Davis et al*, 212 Ala. 282, 102 So. 433, said:

"It has now been long declared by this court that for new and additional duties an incumbent of a public office may be awarded

extra compensation without a violation of sections 118 or 281, forbidding an increase of salary during the term. It may be said a rule of legislative policy has grown up by the sanction of this court's construction of these sections.

"We think there is no need to review the ground of these decisions. We may say that while a public officer takes his office cum onere, and is required to perform the duties from time to time prescribed by law, there is inherent justice in granting compensation for the increased labor and responsibility imposed by new legislation. The just legislator may be rather disposed to create a new office, than to impose unexpected new burdens on an existing officer without compensation. Nor do we think any sound objection obtains to conferring new duties, with compensation, upon the officer who, by reason of knowledge and experience, is best fitted to the new task. Fitness for the new duties growing out of experience in former official labors may furnish the opportunity to get efficient service at minimum expense to the State."

Section 281, Constitution of Alabama 1901, which provides that salaries, fees, or compensation of any civil officer holding any civil office of profit under the State or any county, or any municipality thereof, shall not be increased or diminished during the term for which such officer shall have been elected or appointed, was intended to prohibit the raising or lowering of the salaries of such officers, their duties remaining unchanged, or the change in schedule of fees for given services during such term; but was not designed to inhibit and withdraw from the legislature the power to readjust duties of such offices as the public convenience may require. It has long been the settled law of this State that for new and additional duties imposed upon an office an incumbent thereof may be awarded extra compensation without violating the sections of the constitution forbidding an increase of salary during the term. *Tayloe v. Davis*, supra.

But if the act upon its face, when considered in all its phases, appears to the judicial mind to be a mere colorable pretext, it will be stricken as an evasion of the constitution. *Carnley v. Moore*, 218 Ala. 274, 118 So. 409.

Act No. 62, supra, is not radically different from the old act. No greater responsibility is placed upon the solicitor than was placed by the old act. No new and additional duties are placed upon the solicitor under the new act than were required of him under the old act. The only true change in the new act as far as the solicitor is concerned is the prohibitive feature to the effect that he cannot practice in the criminal courts of the State of Alabama. The solicitor of the Law and Equity Court of Lauderdale County is required to do no more under the new act than he was required to do under the old. By no process of reasoning, under no pretext, can it be said that the amendatory act does not offend Section

281 of the Constitution of Alabama 1901 as applied to the present incumbent of the office during the present term.

The Legislature may, at any time, pass laws increasing or diminishing compensation of even those officers whose compensation may not be increased or diminished during their term; such constitutional limitation merely affects the date on which the law becomes effective. *State Docks Commission v. State ex rel Jones*, 227 Ala. 521, 150 So. 537.

Specifically answering your inquiry, it is my opinion that Act No. 62, supra, which attempted to increase the salary of the solicitor of the Law and Equity Court of Lauderdale County, Alabama, during his existing term of office without substantially increasing the duties of such officer, is invalid as to such officer and is in contravention of Section 281 of the Constitution of Alabama 1901 during his present term. *Moon v. Thompson*, 238 Ala. 356, 191 So. 211.

For like reasons, Act No. 62, supra, offends Section 68 of the Constitution of Alabama 1901 as to the present incumbent during the present term.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 18, 1947.

Honorable O. E. Cole, Chairman,
The Court of County Commissioners,
Russell County,
Phenix City, Alabama.

Counties—Courts of County Commissioners—Jury Commission—Title 30, Section 15, Code of Alabama 1940—Title 30, Section 19, Code of Alabama 1940.

A person duly employed as clerk of the jury commission of a county shall be paid for his services rendered, under the direction of the jury commission, the sum of five dollars per day while actually engaged in performing his duties, to be paid out of the county treasury upon the order of the president of the jury commission.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of April 11, 1947, is as follows:

"The jury commission of Russell County performed services extra upon an order of the Circuit Judge and you rendered an opinion that it was legal to pay same which said services or a part thereof was performed in January of 1947.

"Now, the Clerk of the Jury Commission has filed a claim for \$75.00 as payment for services during the 1st quarter of 1947.

"As Chairman of the Court of County Commissioners of Russell County please advise if this claim can be legally paid."

In my opinion, your inquiry should be answered in the affirmative.

Title 30, Section 15, Code of Alabama 1940, provides that the jury commission of each of the several counties of the State may employ a person to serve as clerk of said jury commission. This statute provides, in full, as follows:

"In counties having seventy-five thousand population or less by the last federal census preceding the employment, the clerk of the circuit court may be employed as the clerk of the jury commission and in such counties the clerk of the jury commission whether he be the clerk of the court or not, shall be paid for his services rendered under the direction of the jury commission the sum of five dollars per day while actually engaged in performing his duties, to be paid out of the county treasury upon the order of the president of the jury commission. In counties having more than seventy-five thousand and less than two hundred thousand population according to the last or any subsequent federal census, the commission shall employ a clerk who shall hold no other office during the term of his employment and who shall be paid for his services rendered under the direction of the jury commission, the sum of five dollars per day while actually engaged in performing his duties, to be paid out of the county treasury upon the order of the president of the jury commission. In counties having more than two hundred thousand population according to the last or any subsequent federal census, the jury commission in any such county shall have authority to employ such clerical assistance as such commission deems necessary and proper, and may expend for such clerical assistance in compensation and in paying their reasonable and necessary expense in performing the duties of their employment a sum not to exceed four hundred and fifty dollars per month to be paid out of the county treasury upon the order of the president of the jury commission. In counties having a population of seventy-five thousand, or less, according to the last preceding federal census, the clerk of the jury commission shall not receive more than three hundred dollars as compensation for his services in any one year."

Title 30, Section 19, Code of Alabama 1940, likewise provides that:

"The clerk of the jury commission must give such time to the performance of his duties as may be required by the jury commission but shall not be paid for Sundays. The jury commission may at any time discharge any clerk employed by it and employ another."

It is specifically provided by Title 30, Section 15, *supra*, that the person so serving as clerk of the jury commission in a county having seventy-five thousand population or less (Russell County comes in this population classification) shall be paid for his services rendered under the direction of the jury commission the sum of five dollars per day while actually engaged in performing his duties, to be paid out of the county treasury upon the order of the president of the jury commission.

I must assume from your inquiry that the person now making claim for services rendered as clerk of the jury commission was duly employed in such capacity and that the services for which payment is claimed were actually performed by such person under the direction of the jury commission. If such be true, and payment for such services has been ordered of you by the president of the jury commission, as prescribed by the above statute, I know of no valid reason why such payment may not legally be made. In fact, it has been held by a former opinion of this office that the claim of a clerk of the jury commission for services rendered as such constitutes a preferred claim against the funds of the county. Biennial Report of Attorney General, 1926-28, page 55.

Inasmuch as it is provided by Title 30, Section 19, *supra*, that the jury commission may at any time discharge any clerk employed by it and employ another, no question arises concerning the term of offices of such clerk. He is an employee of the commission only, subject to discharge at any time. Consequently those questions presented by you in your request for opinion dated January 24, 1947, and treated in the opinion rendered you in reply thereto under date of January 29, 1947, relative to payment of members of the jury commission for services rendered are not here involved nor considered.

Premise considered, it is my opinion that payment of such claim may legally be made by you under the authority of Title 30, Section 15, *supra*.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 18, 1947.

Hon. C. E. Rentz,
Circuit Clerk,
Marengo County,
Linden, Alabama.

Clerks of Circuit Court—Court Reporters—Appeals—Title 13, Sections 198, 262 and Title 7, Sections 214, 273, 276, Code of Alabama 1940—Act No. 461, General Acts 1943, p. 423, as amended by Act No. 352, General Acts 1945, p. 567.

1. Requested charges and motions for a new trial being submitted in writing, it is the duty of the clerk of the circuit court to include same in the assembly of the transcript, and no duplicity should be indulged in by the court reporter.

2. Since Act No. 461, General Acts 1943, p. 423, as amended by Act No. 352, General Acts 1945, p. 567, requires all documents to be identified and copied into evidence by the court reporter, it is the duty of the court reporter to prepare this portion of the transcript, and no duplicity should be indulged in by the clerk of the circuit court.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of August 12, 1947, is as follows:

"Please give me the following information:

"Do the given and refused charges go into a transcript other than in the evidence prepared by the Court Reporter?

"Does the motion for a new trial go in a transcript other than in the evidence prepared by the Court Reporter?

"Does an exhibit of either the defendant or State go into a transcript other than in the evidence prepared by the Court Reporter?"

By Title 13, Section 262, Code of Alabama 1940, the duties of the court reporter are set out in part as follows:

"The official court reporter shall attend in person, except as otherwise herein provided, the sessions of court held in the circuit for which he is appointed, and in every case where directed by the

judge or requested by a party thereto, he shall take full stenographic notes of the oral testimony and proceedings, except argument of counsel, and note the order in which all documentary evidence is introduced, all objections of counsel, the rulings of the court thereon, and exceptions taken or reserved thereto. * * * * * (Emphasis supplied.)

It can be seen from this code section that the court reporter transcribes a complete account of the designated oral testimony and proceedings.

The preparation of the transcript and its consolidation is the duty of the clerk of the circuit court. By Title 13, Section 198, Subsection 15, Code of Alabama 1940, he is required: "To make out transcripts, as required by law, in all cases of appeal to the supreme court or court of appeals."

Rules of Practice of the Supreme Court are found in the Appendix to Title 7, Code of Alabama 1940. Supreme Court Rule 26 sets out the complete mode of preparing the transcript, and Supreme Court Rule 27 sets out what matters are omitted from the transcript.

By Act No. 461, General Acts 1943, p. 423, bills of exceptions were abolished in appeals from the circuit court. This act was amended by Act No. 352, General Acts 1945, p. 567. Section 1 of this act now reads as follows:

"That bills of exceptions in the trial of cases at law in the circuit court and courts of like jurisdiction and all other courts of record having a full time court reporter and from which appeals lie directly to the court of appeals or the supreme court of Alabama in the state of Alabama are hereby abolished. If a party to a cause tried in such court desires to appeal from a judgment rendered he shall give notice to the court reporter that he desires to appeal and request the evidence to be transcribed. The court reporter shall then promptly transcribe the evidence, including objections, oral motions and rulings of the court, certify to it and file it with the clerk. He shall also identify and copy all documents offered in evidence in the order in which offered. The evidence so transcribed and certified and filed shall be a part of the record, and assignments of error may be made as though the transcript constituted a bill of exceptions. If the reproduction of documents, such as maps or photographs, be difficult or impracticable the court reporter may attach the original and identify them as offered in evidence and they shall be a part of his transcript of evidence. The court reporter shall include in his certificate a statement that he has notified both parties or their attorneys of the filing of the transcript. Within ten days thereafter either party may file with the clerk any objections to the certified transcript with a certificate that he has notified the opposing party or attorney of record that the objections will be called to the attention of the trial judge at a specified time and place not later than

fifteen days after filing such objections. The trial judge shall hear the parties upon such objections and make such corrections and additions as he may think proper and make written order thereon as hereinafter provided. Such hearing of objections may be continued by the judge, but he shall make his order thereon within fifteen days after such hearing. Such hearing and the order thereon shall be concluded within ninety days from the date of the trial or the date of ruling on a motion for new trial. Any ruling on such objections and any ruling upon a statement in lieu of a certified transcript will be reviewable upon error duly assigned by either party upon appeal of the cause. If any evidence should be taken upon such hearing upon objections it shall be duly certified by the court reporter on supreme court transcript paper, with two carbon copies thereof, all three of which shall be filed with the clerk and the original shall become a part of the record and included in the transcript."

It can be seen from this statutory enactment that all oral motions, together with rulings thereon, shall be transcribed by the court reporter and filed with the clerk.

Motions for a new trial are in writing and are to be filed within thirty days after entry of judgment. Title 7, Section 276, Code of Alabama 1940. On appeal, they become a part of the record proper. Title 7, Section 214, Code of Alabama 1940 and Act No. 461, as amended *supra*. Therefore, since a motion for a new trial is in writing, the inclusion of same in the record is made by the clerk of the circuit court and not the court reporter in the preparation of the transcript.

Similarly, all requested charges must be in writing. Title 7, Section 273, Code of Alabama 1940. Therefore, all given and refused charges are entered by the clerk of the circuit court and not the court reporter in the preparation of the transcript.

Relative to exhibits, your attention is again directed to that portion of Act No. 461, as amended, quoted, *supra*. You will observe that it is the further duty of the court reporter to "identify and copy all documents offered in evidence in the order in which offered." The duty, therefore, rests here upon the court reporter and not the clerk of the circuit court.

With this clarification offered, your attention is directed to the fact that the clerk of the circuit court is charged only with the preparation of a "full and complete transcript of the record and proceedings in the case." (See Title 7, Section 767, Code of Alabama 1940.) As long as a full and complete transcript of the record and proceedings in a case is prepared, in accordance with the requirements of law, it is my opinion that no duplicity of entries should be indulged in. You are herewith advised accordingly.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 18, 1947.

Hon. Pat Byrne,
Commissioner of Licenses,
Mobile County,
Court House,
Mobile 1, Alabama.

Licenses—Title 51, Sections 840 and 850, Code of Alabama 1940.

Unless prohibited by the particular license schedule, when a person buys a place of business after April 1st in any year, he should only be liable for a half-year license, although the former owner had operated the business prior to the 1st of April without procuring a license.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of August 12, 1947, is as follows:

"If a person buys a place of business after April 1st, said place of business having been in operation prior to April 1st, but no privilege license having been procured for the business, is the new owner liable for full year license?

"Your earliest possible attention will be appreciated."

Your request does not state the particular license schedules involved, therefore, I am answering your question generally.

It is my opinion that the present owner, who bought the business after the first of April, should only be liable for a half-year license, unless the particular license schedule prohibits a half-year license.

Title 51, Section 840, Code of Alabama 1940, reads as follows:

"Section 840. License deemed a personal privilege.—(a) Every license shall be held to confer a personal privilege to transact the business, employment or profession which may be the subject of the license, and shall not be exercised except by the person, firm or corporation licensed, unless specifically authorized by law to do so. (b) A business or privilege for which such license is issued is, under actual sale, transferred to a new ownership in which case a transfer of license may be effected by application to the probate judge originally issuing such license and the payment of a fee of fifty cents."

Title 51, Section 850, Code of Alabama 1940, reads as follows:

"Section 850. License for part of year; amount of tax.—Unless otherwise provided, if any business licensed by this title shall commence after the first day of April in any year, the amount of the license or privilege tax shall be one-half of the year's license or privilege tax. In all other cases the license shall be taken out for the full term of one year, unless a shorter term is fixed by the provisions of this title. In all cases where the amount of license is rated according to the population of the town, city or county, the population of such town, city or county as fixed by the last preceding United States census shall govern."

It may be seen from a reading of Section 840, *supra*, that every license levied under the provisions of Title 51, Code of Alabama 1940, confers a personal privilege upon the person procuring the same, to transact the business, employment, or profession which may be the subject of the license, such a license being subject to transfer in the event the business for which it is issued is, under actual sale, transferred to a new ownership, as provided therein.

Under Section 850, *supra*, unless otherwise provided in a particular license schedule, if a business is commenced after the first day of April in any year, the amount of the license shall be one-half of the amount of the license for such business for a full year.

In the instant case, the person who bought a place of business after April 1st, cannot be said to have engaged in such business before that date; and, consequently, he would not be liable for a full year's license, unless the particular license schedule involved prohibits a half-year license. The fact that the business had been previously operated by another person who failed to procure a license therefor has no bearing on the liability of the person who bought the same for a license therefor.

Of course, the previous owner and operator of the business is liable for a full year's license for the operation of the same, together with appropriate penalties for delinquency in procuring the same, which liability may be enforced as provided by statute.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 19, 1947.

Hon. John E. Mandeville,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

Jurors—Grand and Petit—Mileage—Under Title 11, Section 98, Code of Alabama 1940, as amended by Act No. 297, General Acts 1947, approved August 7, 1947.

1. A petit juror is entitled to mileage only one time for attending a session of the court to which he is summoned.

2. A grand juror is entitled to mileage more than one time, if the grand jury of which he is a member, is recessed after completing its labors and is reassembled before being finally discharged.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of September 5, 1947, is as follows:

"An Act of the Legislature Numbered 297, approved August 7, 1947, reads in part as follows:

"Regular jurors, grand and petit, are entitled to four dollars for each day's services, five cents for each mile traveled in going to and returning from court, and ferriage and toll, to be proved by oath of the juror before the clerk of the court."

"Grand Jurors and Petit Jurors are summoned by this Court to serve a period of several days. It is customary for Jurors who live outside the City Limits of the City of Mobile to ride in from their homes to the Courthouse each day they are required to serve and to ride back from the Courthouse to their homes each day they are required to serve and after their duties as Jurors are completed.

"I therefore ask you for an opinion as to whether each Juror who is entitled to mileage for traveling from their homes to the Courthouse, are entitled to that mileage on each of every day that they are required to serve as Jurors, if they are entitled to mileage only one time regardless of the number of days they are required to serve as Jurors?"

The per diem and mileage of jurors, grand and petit, is now provided for by Title 11, Section 98, Code of Alabama 1940, as amended by Act No. 297, General Acts 1947, approved August 7, 1947. The only material change is that the per diem of such jurors is now fixed at \$4.00 instead of at \$3.00 as was formerly the case.

Under Title 30, Section 38, Code of Alabama 1940, when a juror is summoned to attend upon a session of court, if he is a petit juror he serves for the week for which he is summoned, unless discharged sooner by the court, but may be required to serve until any case on trial is determined.

Construing these two sections together, I think it is the legislative intent that a petit juror can collect mileage only one time for attending a session of the court to which he is summoned. I think that Section 38, *supra*, contemplates that when a juror is summoned to a session of court and serves as a petit juror he will remain in attendance upon the session of the court until discharged by the court.

A different situation arises with respect to a juror who is selected as a member of the grand jury. Under Section 38, *supra*, a grand jury which is empaneled for a session of the court is the grand jury for that session and continues as such until discharged by order of the court. However, a grand jury may, in the discretion of the court, be permitted to recess when it has completed its labors, subject to call, and may be reassembled at any time prior to its discharge. See Title 30, Section 72, Code of Alabama 1940. In the event that a grand jury is reassembled after having been recessed under this section, in my opinion, the members thereof would be entitled to mileage, as provided by Section 98, as amended, *supra*, for their travel in connection with such reassembly. However, a mere recess by the grand jury from time to time for its own convenience before having completed its labors, would not, in my opinion, entitle the members thereof to mileage for more than one time. Cf. *Biennial Report of Attorney General, 1930-32, page 167.*

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

September 19, 1947.

Hon. Haygood Paterson,
Commissioner,
Department of Agriculture & Industries,
CAPITOL.

State Markets Board—State Highway Department—State Department of Corrections and Institutions—Act No. 32, General Acts 1943, p. 25, as amended by Act No. 285, General Acts 1945, p. 472.

“Surveying and engineering expenses” and “labor expenses” incurred in the construction of roads, approaches, and paving in connection with State Markets Board projects under Act No. 32, General Acts 1943, p. 25, as amended, are not proper and legal charges against the State Markets Board, but are borne by the State Highway Department and the State Department of Corrections and Institutions respectively. All other expenses incurred on such projects are legal charges against the State Markets Board.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of February 13, 1947, is as follows:

"The General Acts of the Regular Session of 1943, page 25 provides for the establishment of the State Markets Board. Section 8 of said Act provides as follows:

"All surveying and engineering services in connection with the construction of roads, approaches, and paving connected with such market or markets shall be furnished by and shall be rendered under the supervision of the State Highway Department, without charge to the State Markets Board, and all labor for construction of such roads, approaches, and paving shall be furnished without charge by the State Department of Corrections and Institutions."

"For your information, I am attaching hereto copy of bills rendered this Board by the State Highway Department.

"Please let me know what part of these bills are a legal charge against the State Markets Board and what portion of the services herein listed should be provided free of charge under the provisions of this Section?"

The bills rendered by the State Highway Department, attached to your inquiry, include three classes of items; viz. labor, materials and miscellaneous. The miscellaneous items cover travel and subsistence expenses, lights and water expenses, and telephone and telegraph expenses.

In my opinion, the "labor expenses" are not a legal charge against the State Markets Board. The "material expenses" are a proper charge. The "miscellaneous expenses" may or may not be a proper charge, depending upon the exact nature of same. If they are incidental to and a part of "surveying and engineering services" or "labor," they are not legal charges; otherwise, they are proper charges against the State Markets Board.

Act No. 32, General Act 1943, p. 25, as amended by Act No. 285, General Acts 1945, p. 472, authorizes State Market Boards to have constructed driveways, approaches, and paving at markets and facilities established by the Board, and to pay the costs of such construction out of its appropriation, subject to the limitations of Section 8 thereof, quoted in your letter of inquiry. Under said section, "all surveying and engineering services" shall be furnished by the State Highway Department without charge to the State Markets Board, and "all labor" shall be furnished without charge by the State Department of Corrections and Insti-

tutions. This proviso is without limitation or qualification. It, therefore, follows that all the items of the attached bills that fall within either of these two categories are not legal charges against the State Markets Board. All the items which are not within either of these categories would be proper charges.

In view of the above, I reach the following conclusions concerning the items shown on the bills in question:

1. "Labor expenses" are not legal charges against the State Markets Board, since "labor" is required to be furnished by the State Department of Corrections and Institutions. This is true regardless of whether or not the labor is free or convict labor.

2. "Material expenses" are a legal and proper charge against the State Markets Board.

3. Those "miscellaneous expenses," which are incidental to and a part of either "surveying and engineering services" or "labor," are not a legal charge against the State Markets Board. Otherwise, they are. The bills do not show in what connection these miscellaneous expenses were incurred. If they were incurred in connection with and incidental to and a part of either the above two categories, they should be borne by either the Highway Department or the State Department of Corrections and Institutions, as the case may be. On the other hand, if they were incurred in connection with any other phases of the project, (for example in securing materials, etc.), they are proper and legal charges against the State Markets Board.

I am herewith returning the bills under consideration.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 19, 1947.

Hon. Frank A. Reagan,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Physicians—Licenses—Veterans—Exemptions—Title 51, Section 552, Code of Alabama 1940—Act No. 353, General Acts 1945, page 570, approved July 6, 1945.

1. License levied upon a person engaged in the practice of medicine by Title 51, Section 552, Code of Alabama 1940, does not apply until such person shall have practiced his or her profession as long as two years.

2. Under Act No. 353, General Acts 1945, page 570, approved July 6, 1945, exemptions from business or occupational license taxes granted thereby run only for a period of three years after the effective date of said act or for a period of three years after discharge from or termination of service in the armed forces of the United States, whichever is the later.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of April 18, 1947, is as follows:

"Under Title 51, Section 552, it states that License imposed by this Section shall not apply until such person shall have practiced his or her profession as long as two years. In one case we have a colored doctor who failed to receive his two year practice before entering Service, and now being discharged he has received his two years in his Profession. According to G. I. bill in case he meets all requirements would he be entitled to the three years provided under the G. I. Bill."

Title 51, Section 552, Code of Alabama 1940, levies a license upon each person engaged in the practice of medicine but provides that the license levied thereby "shall not apply until such person shall have practiced his or her profession as long as two years."

Act No. 353, General Acts 1945, page 570, approved July 6, 1945, which grants certain exemptions from business or occupational license taxes to veterans who meet the qualifications and requirements set out therein, provides that such exemptions shall be for a period of three years after the effective date of said act or for a period of three years after discharge from or termination of service in the armed forces of the United States, whichever is the later.

As I understand your inquiry, you desire to know whether or not the physician mentioned therein is entitled to an exemption from the license levied by Section 552, supra, for a period of two years by virtue of the above quoted provision of said section, and, thereafter, is entitled to the exemptions provided by Act No. 353, supra, for three years—a total of five years.

In my opinion, he is not. As stated above, the exemptions granted by Act No. 353, supra, run for a period of three years after the effective date of the Act or for a period of three years after discharge from or termination of service in the armed forces of the United States, whichever is the later; and do not run from the termination of the date on which a person may have been exempted from the payment of license by some

other statutory provision, such as the provision of Section 552, supra, in the instant case.

I deem it advisable to point out to you that no person is entitled to the exemptions granted by Act No. 353, supra, for any period of time unless he meets all of the qualifications and requirements therefor contained in said act.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

September 19, 1947.

Hon. Ben Reeves, Sheriff,
Pike County,
Troy, Alabama.

Counties—Sheriffs—Jails—Title 45, Sections 115 and 185,
Code of Alabama 1940.

1. Inasmuch as the legal custody of the jail is placed in the hands of the sheriff by Title 45, Section 115, Code of Alabama 1940, the duty is imposed upon the sheriff to select and appoint necessary guards or jailers and payment for the services of said guards or jailers is an item of county expense.

2. Under Title 45, Section 185, Code of Alabama 1940, sheriff is required to employ night deputy, watchman, or attendant at the jail, at the expense of the county, unless the Department of Corrections and Institutions by written order finds the same unnecessary.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of August 21, 1947, is as follows:

"At the present time, I have one deputy watchman or attendant, commonly referred to as a jailer. His compensation is paid out of the general fund of the county.

"It is my opinion that I need the services of two jailers.

"Please advise me whether or not the county governing body of Pike County has the authority to authorize me to employ two

jailers, the compensation of such jailers to be paid out of the general fund of the county."

Title 45, Section 115, Code of Alabama 1940, provides as follows:

"§ 115. Legal custody and charge of jail.—The sheriff has the legal custody and charge of the jail in his county, and all prisoners committed thereto (except in cases otherwise provided by law), and may appoint a jailer for whose acts he is civilly (sic) responsible."

In Biennial Report of Attorney General 1918-20, page 184, this office rendered an opinion holding that this section imposed upon the sheriff a duty to select and appoint necessary guards for the jail and the expense of their services should be borne by the county. This opinion is quoted in part as follows:

"* * * I beg to advise that inasmuch as the legal custody and charge of the jails is placed in the hands of the sheriffs of the several counties, Code Sec. 7191 (now Title 45, Section 115, Code of Alabama 1940), the duty is imposed upon them to select and appoint the necessary guards and the claim for the services of the guards should be presented to the fiscal court of the county and * * * it becomes the duty of that court to see that the expenses are properly allowed as a claim against the county. * * *"

Your attention is also directed to Title 45, Sec. 185, Code of Alabama 1940, which reads as follows:

"§ 185. Deputy or watchman must be in attendance.—Prisoners shall not be confined in any jail or prison in this state when such jail or prison is not provided with a deputy, watchman or attendant, whose duty it shall be to watch the jail or prison at night for the prevention of escapes, and fire, and to aid in case of sickness among the prisoners, and who shall have access to the jail or prison and to the prisoners. If the department (Department of Corrections and Institutions) is satisfied, after inspection, that the construction and management of a jail is such as to render a night watchman unnecessary, it may by written order to the sheriff suspend the appointment of said watchman, this order to be subject to revocation at the discretion of the department. The sheriff, in case of a county jail, or the proper governing authority, in case of a municipal jail, shall appoint, direct and control said deputy, watchman, or guard, and the court of county commissioners or board of revenue, or the proper municipal governing authority, as the case may be, shall fix a reasonable salary and the same shall be paid out of the funds of the county or of the municipality, if it be a town or city jail, in which the jail is located."

This section is specific authority for the employment of a night deputy watchman, or attendant, at the jail, at the expense of the county.

In fact, it is mandatory that such a deputy, watchman or attendant be employed, unless the Department of Corrections and Institutions by written order finds the same unnecessary. Biennial Report of Attorney General, 1936-38, p. 771.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

September 22, 1947.

Honorable John B. Sockwell,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Court Reporters—Law and Equity Court of Lauderdale County—Law and Equity Court of Colbert County—Offices of Profit—

Local Acts 1931, page 72—Act No. 32, Local Acts 1947—Section 280, Constitution of Alabama 1901.

1. Neither the position of reporter for the Law and Equity Court of Lauderdale County nor the position of reporter for the Law and Equity Court of Colbert County is an "office of profit" within the meaning and prohibition of Section 280, Constitution of Alabama 1901.

2. The person serving as reporter for the Law and Equity Court of Lauderdale County may, at the same time, serve as reporter for the Law and Equity Court of Colbert County in no violation of the prohibition announced by Section 280, Constitution of Alabama 1901.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of July 31, 1947, is as follows:

"Recently there has been established in this county a Law and Equity Court. The Bill providing for this Court also provided that a Court Reporter should be obtained and authorized a maximum salary of \$150.00 per month for the payment of said Reporter.

"It is difficult now to obtain a competent Reporter at any salary. The Law and Equity Court of Lauderdale County has a Reporter and it might be possible to arrange for her to serve as Reporter for both Courts. Such an arrangement would be most

satisfactory, financially and otherwise, to this county. However, the 1901 State Constitution, Article XVII, Section 280, prohibits any person holding two offices of profit in the State.

"I would appreciate very much your opinion as to whether the above stated Section would prevent the Court Reporter of The Law and Equity Court in Lauderdale County from serving also as the Court Reporter for The Law and Equity Court in Colbert County."

It is my opinion that the person serving as reporter for the Law and Equity Court of Lauderdale County may also serve as reporter for the Law and Equity Court of Colbert County, receiving compensation for services rendered each of such courts, in no violation of the provisions of Section 280, Constitution of Alabama 1901.

The constitutional provision above referred to is that section which prohibits (with certain exceptions not pertinent hereto) the holding by any person of two offices of profit under this state at one and the same time. Said section provides in full as follows:

"Sec. 280. No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office, hold any office of profit under this state; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the peace, constables, notaries public, and commissioner of deeds."

In giving answer to the question presented by your inquiry, it must be determined whether the two positions of employment mentioned therein constitute "offices of profit" within the meaning of Section 280, supra.

It is my opinion that neither the position of reporter for the Law and Equity Court of Lauderdale County nor the position of reporter for the Law and Equity Court of Colbert County is an "office of profit" within the meaning and prohibition of Section 280, supra.

An "office of profit" within the meaning of such constitutional provision has been defined by the Supreme Court of this state as being any state, county or municipal office, whether elective or appointive, carrying with it as a necessary incident to its exercise some part of the sovereign power of the state, with the term and salary, or prerequisites, of such office being fixed by law. *State ex rel. Glenn vs. Wilkinson*, 220 Ala. 172, 124 So. 211.

An inspection of the legislative enactments governing the employment of reporters by each of the above mentioned courts reveals that such positions in no way meet the definition attached to an "office of profit" by the Supreme Court in the *Wilkinson* case, supra.

The Law and Equity Court of Lauderdale County was created by Local Acts 1931, page 72, which act was passed over the Governor's veto upon May 29, 1931. Section 28 of such act makes provision for the employment of a court reporter in the following manner:

"The judge of this court shall secure the services of a competent shorthand writer to attend the terms of this Court and report in shorthand all the cases tried herein and during the time he is actually engaged in reporting and transcribing for the court or the attorneys he is an officer of this court, and he shall receive a salary to be fixed by the judge of said court and not to exceed One Hundred Dollars per month, and said salary shall be paid in monthly installments at the end of each month and shall be paid to him from the funds of the County by the County Treasurer or other custodian of said funds, on a warrant drawn thereon by the judge of this court, provided, however, the judge of this court shall have the right to remove said reporter from office at his pleasure. * * * *"

(Emphasis added.)

The Law and Equity Court of Colbert County was created by Act No. 32, Local Acts 1947, approved June 27, 1947. This act apparently, to a great extent, was modeled after the Local Act of 1931, supra, creating the Law and Equity Court of Lauderdale County. Section 31 of Act No. 32, supra, provides for the employment of a court reporter in the following manner:

"The judge of this court shall secure the services of a competent shorthand writer to attend the terms of this court and report in shorthand all cases tried herein and during the time he or she is actually engaged in reporting and transcribing for the court or the attorneys he or she is an officer of this court, and he or she shall receive a salary to be fixed by the judge of said court and not to exceed One Hundred Fifty Dollars per month, and said salary shall be paid in monthly installments at the end of each month and shall be paid to him or her from the funds of the county by the County Treasurer or other custodian of said funds, on a warrant drawn thereon by the judge of this court, provided, however, the judge of this court shall have the right to remove said reporter from office at his pleasure. * * * *"

(Emphasis added.)

It is to be noted that neither the reporter for the Law and Equity Court of Lauderdale County nor the reporter for the Law and Equity Court of Colbert County holds office for a term fixed by law, but that both of such persons hold office at the will of the judge appointing them and may be removed from office at his pleasure. Such being true, neither of such offices are "offices of profit" as defined by the Supreme Court of the state in the case of *State ex rel. Glenn vs. Wilkinson*, supra. It is, therefore, my opinion that the same person may serve as reporter for the Law and Equity Court of Lauderdale County and as reporter for

the Law and Equity Court of Colbert County, at one and the same time, in no violation of the prohibition announced by Section 280, Constitution of Alabama 1901.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 23, 1947.

Hon. Hunter Phillips,
Judge of Probate,
Choctaw County,
Butler, Alabama.

Counties—Roads and Bridges—Abandonment—Title 12, Section 11, Code of Alabama 1940.

1. Nonuser of a public road short of the time of prescription (twenty years) does not amount to an abandonment thereof.

2. Under the provisions of Title 12, Section 11, Code of Alabama 1940, the Court of County Commissioners or other governing body of a county has the authority to discontinue the use of a public road.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 26, 1947, is as follows:

"I would like to have an official opinion on the following matter:

"We have two roads located in this county leading from Womack Hill to Wright's and LeNoir's landing on the Tombigbee River. These were at one time public roads, but have been neglected and partially abandoned by the Commissioner's Court and, on account of this, the roads have been fenced up some one-half mile from the river bank. For the past few years, it has been necessary to haul logs and timber over these roads and there has also been quite a lot of hunting and fishing along the river. Therefore, it has become necessary for people to travel these roads more than any time during the past several years. The people using these roads are now asking the Commissioners Court to re-establish said roads and, in order to do this, it is necessary that we ask the landowners to remove their fences or gates which are obstructing the road and, naturally, this brings up the question as to whether the Commissioners

Court has authority to open these roads and place them on the county road system without obtaining right-of-way from the land-owner."

The question presented by you is one of fact and does not admit of a definite answer. The only way that I can be of assistance to you in determining this question is to set out the law in regard thereto.

You state in your request that the two roads here considered were at one time public roads, but have been neglected by the Commissioners' Court and in some instances have not been used for a number of years. The first question of fact which presents itself is whether or not the county, by nonuser, has abandoned these roads as public roads. Our Supreme Court, in the case of *Harbison v. Campbell*, 178 Ala. 243, 59 So. 207, held that the nonuser of a public road for a time shorter than the prescriptive period (twenty years) does not operate as a discontinuance or abandonment of the road. This case states the general rule of law in regard to abandonment of roads by a nonuser.

If the facts are such that these roads have not been used as public roads for a period of twenty years, then in my judgment, this would amount to a discontinuance or an abandonment of these roads by the county, and it would then become necessary for the county to re-acquire the right-of-ways for these roads before they would be used by the general public as public roads.

Your attention is called to Title 12, Section 11, Code of Alabama 1940, which reads as follows:

"The court possesses original and unlimited jurisdiction in relation to the establishment, change, or discontinuance of roads, bridges, causeways, ferries, and stock law districts within the county, except where otherwise provided by law, to be exercised in conformity with the provisions of this Code."

It is to be noted that the county possesses unlimited jurisdiction as to the discontinuance of any road located within the county. As can be seen, this is also a question of fact as to whether or not the county governing body by some former act has abandoned or discontinued the use of these roads. If you find that by some act of the county governing body these roads have been discontinued under the authority of Section 11, supra, then of course it will be necessary for the county to re-establish these roads by re-acquiring the right-of-ways thereto.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 23, 1947.

Mrs. Jacqueline Lewis, Secretary,
Alabama Pension Commission,
CAPITOL.

Confederate Veterans—Pensions—Title 60, Section 29, Code of Alabama 1940, as amended by Act No. 8, H.B. 109 (M.S.), approved June 19, 1947—Title 60, Section 35, Code of Alabama 1940, as amended by Act No. 12, General Acts 1943, p. 9.

Should a Confederate veteran who is on the pension roll or a widow of a Confederate veteran who is on the pension roll die during the months of April, May, or June 1947, the lump sum payment, as provided for by Title 60, Section 35, Code of Alabama 1940, as amended by Act No. 12, General Acts 1943, page 9, should be calculated in accordance with the terms of Title 60, Section 29, Code of Alabama 1940, as previously amended, before July 1, 1947, and therefore, should be calculated in accordance with the terms of said section as amended by Act No. 8, H.B. 109 (M.S.), approved June 19, 1947.

Opinion by Assistant Attorney General McQueen.

Dear Mrs. Lewis:

Your request for an official opinion bearing date of June 20, 1947, is as follows:

“Re: Act No. 8, House Bill No. 109 by Pinson Regular Session of 1947, Approved June 17, 1947.

“Reference is made to an Act to amend Section 29 of Title 60, Code of Alabama 1940, as amended by an Act approved May 15, 1943, entitled ‘an Act to amend Sections 29 and 35 of Title 60 of the 1940 Code of Alabama which provides for an increase in Confederate Pension payments to \$50.00 for widows and \$150.00 for veterans, effective July 1, 1947.

“Section 35 of Title 60 as amended by the 1943 legislature (1943 Acts, page 9) sets out the provisions for payments after death of such persons entitled to pensions.

“Please render your official opinion upon the question of calculating the amount payable under said Section 35, supra, in the event of death during the months of April, May and June, 1947.

“Any additional amount due must necessarily be paid on supplemental payrolls and your earliest opinion will be greatly appreciated.”

Act No. 8, H. B. 109 (M. S.) approved June 19, 1947, amending Title 60, Section 29, Code of Alabama 1940, as amended increased the pension of Confederate veterans from \$100.00 per month to \$150.00 per month, and increased the pension of widows of Confederate veterans from \$40.00 per month to \$50.00 per month. It is to be noted, however, that Section 2 of this Act provides that it shall become effective on the first day of the month following its passage and approval by the Governor, thereby making the effective date of the Act July 1, 1947.

Act No. 12, General Acts 1943, page 9, which act amends Title 60, Section 35, Code of Alabama 1940, provides that in the event of the death of a veteran-pensioner survived by either a widow or minor child or children, or in the event of the death of a widow-pensioner survived by a minor child or children, a warrant equal to the total amount of the next three monthly payments succeeding the death of said pensioner shall be issued, in the first instance to the widow, or there being no widow, to the minor child or children of such veteran pensioner; and in the second instance to the minor child or children of such widow-pensioner. In the event either of such pensioners are survived by neither a widow nor a minor child or children, the amount payable shall be disposed of as otherwise provided by this act.

Should a pensioner die during the month of April 1947, the amount of payment provided by Section 35, as amended for the months of May and June should be calculated on the pension as set out in Section 29 before it was amended by Act No. 8. That is to say, for these two months in the case of the death of a veteran-pensioner, the calculation should be on the basis of \$100.00 per month and in the case of the death of a widow-pensioner the calculation should be on the basis of \$40.00 per month. For the month of July, the calculation in the case of the death of a veteran-pensioner should be on the basis of \$150.00 per month and in the case of the death of a widow-pensioner on the basis of \$50.00 per month. This for the reason that Act No. 8, became effective on July 1, 1947. For death occurring during the month of April 1947, the total amount of the warrant in the case of the death of a veteran-pensioner should be \$350.00 and in the case of the death of a widow-pensioner the total amount of the warrant should be \$130.00.

Should a pensioner die during the month of May 1947, the amount of payment provided by Section 35, as amended, for the month of June should be calculated on the pension as set out in Section 29 before it was amended by Act No. 8. That is to say, for the month of June in the case of the death of a veteran-pensioner the calculation should be on the basis of \$100.00 per month and in the case of the death of a widow-pensioner the calculation should be on the basis of \$40.00 per month. For the months of July and August the calculation in the case of the death of a veteran-pensioner should be on the basis of \$150.00 per month and in case of the death of a widow-pensioner on the basis of \$50.00 per month. The total amount of the warrant in the case of death of a

veteran-pensioner during the month of May should be \$400.00 and in the case of the death of a widow-pensioner the total amount of the warrant should be \$140.00.

Should a pensioner die during the month of June 1947, the amount of payment provided by Section 35, as amended, for the months of July, August and September should be calculated on the pension as provided in the amendatory act. That is to say, for the three months following the death in June in the case of the death of a veteran-pensioner the calculation should be \$150.00 per month and in the case of the death of a widow-pensioner the calculation should be on the basis of \$50.00 per month. Should the death of a veteran-pensioner occur during the month of June the total amount of the warrant should be \$450.00 and should the death of a widow-pensioner occur during the month of June the total amount of the warrant should be \$150.00.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 23, 1947.

Hon. J. T. Dykes, Superintendent,
Dale County Schools,
Ozark, Alabama.

Schools—County Board of Education—Title 52, Section 76,
Code of Alabama 1940.

1. A county board of education cannot be sued on a claim arising from the negligence of one of its servants or agents, because it is an independent agency of the state acting in a governmental capacity.

2. A county board of education is not authorized to employ counsel to represent a county school bus driver who is being sued in a personal action on a claim arising out of said driver's operation of a county school bus.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of September 15, 1947, is as follows:

"One of the Dale County School Bus Drivers had a wreck with a car driven by a Mr. Anderson from Dothan, Ala., last year. Mr.

Anderson, through his attorney, has entered suit against Mr. Kelley for \$500 damage. This suit claims that Mr. Kelley drove carelessly and negligently while driving the school bus for Dale County.

"Since Mr. Kelley is an agent for the state and county, is it legal for the county board of education to pay their attorney a fee as counsel for the defendant in the above mentioned case?

"Please let me have advice on this matter at an early date since Mr. Kelley has only 30 days from September 1st to answer the complaint."

It is my opinion that your question must be answered in the negative.

County boards of education are creatures of statute, charged with the duty of devoting public funds to ends prescribed by law, and can make only such disbursements as are expressly or impliedly authorized by statute. This well known rule of law is ably stated by Mr. Justice Bouldin, for the Supreme Court of Alabama, in the case of *Woodruff v. Beeland*, 220 Ala. 652, 127 So. 235, as follows:

"An administrative board or other agency, the creature of legislation, has only the powers conferred by its creator. Every such board charged with the duty of devoting public funds to ends prescribed by law must point to a 'thus saith the law' for every disbursement.

"Unless a given charge on such fund is expressly or impliedly authorized, it cannot be lawfully incurred."

One of the powers and duties of a county board of education is to arrange for and effect the transportation of pupils to and from consolidated schools. See Title 52, Section 76, Code of Alabama 1940. Consequently, if the school bus driver referred to in your letter of inquiry was driving a school bus owned by the County Board of Education of Dale County and was merely employed by the County Board of Education of Dale County for the purpose of driving such school bus, you are correct in stating that he is an agent of the county board of education. Too, he was acting for the county board of education in a governmental capacity.

However, it has been held by numerous decisions of the Supreme Court of the State that a county board of education cannot be sued on a claim arising from the negligence of one of its servants or agents because it is an independent agency of the State acting in a governmental capacity. Such holding is found expressed as follows in the case of *Hawkins v. State Board of Adjustment, et al.*, 242 Ala. 547, 7 So. 2d 775:

"This Court has held that a county board of education could sue and be sued to a limited extent, but not on a claim arising from

the negligence of one of its servants or agents because it is an independent agency of the State, not one which is immediate, but nevertheless it is acting in a governmental capacity. *Turk v. Board of Education*, 222 Ala. 177, 131 So. 436; *Ex parte Board of School Com'rs of Mobile County*, 230 Ala. 304, 161 So. 108. Those cases, following *Shepherd v. Jones*, 228 Ala. 307, 153 So. 223, make a separate classification of strictly State boards and commissions, including State colleges and describe them as immediate and strictly governmental agencies, not subject to suit. But that a county board of education, while not an immediate agency of the State, acts in a public and governmental capacity, and therefore is not liable for the torts of its agents and employees, while so engaged, but is ordinarily otherwise subject to suit. . . ."

Such being true, it is apparent that the rights or interest of the County Board of Education of Dale County are in no way involved in the current suit. The proceeding in question is one of a purely personal nature between the defendant bus driver and the complainant. It is a suit in which the County Board of Education or the State is neither directly or indirectly concerned. Therefore, in my opinion, the County Board of Education is not authorized to employ counsel to represent the defendant in said suit. Biennial Report of Attorney General, 1934-36, page 256.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 23, 1947.

Hon. Neal Boyd, President,
Etowah County Board of Revenue,
Gadsden, Alabama.

Commissioners' Court—Sale of Real Property. Title 12, Section 177, Code of Alabama 1940.

The Etowah County Board of Revenue is invested with control of all county property and may sell at private sale the former county courthouse site, provided such sale is fair and not infected with fraud or corruption.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of September 3, 1947, is as follows:

"Subsequent to an election authorizing a bond issue in the principal amount of \$500,000.00 for the purpose of erecting a Court House and Jail in the County, the Board of Revenue of Etowah County entered into negotiations to sell the present Court House site in Gadsden and to purchase another site within the original corporate limits of the City of Gadsden, Alabama.

"In view of the extreme importance of such a move and in order for the members of the Board to be assured that they are acting within their authority, I will greatly appreciate your advising me whether our Board of Revenue has sufficient legal authority to sell the old Court House site at a private sale for an amount which in the opinion of the Board is profitable to the County."

It is my opinion that the governing body of your county may lawfully sell at private sale the real estate belonging to Etowah County that was formerly used as a courthouse site. In the absence of fraud, corruption, or unfair dealing, the sale may be made at private sale for a sum not less than the fair and reasonable value.

My opinion is supported by Title 12, Section 177, Code of Alabama 1940, reading as follows:

"§177. Commissioners have custody of property, and may sell.—The court of county commissioners have control of all property belonging to the county, and may, by an order to be entered on its minutes, direct the disposal of any real property, which can be lawfully disposed of, and direct the probate judge to make titles thereto; and a conveyance made by the probate judge in accordance with such order invests the grantee with the title of the county."

The Supreme Court of Alabama, in the case of *Corning v. Patton*, 236 Ala. 354, 182 So. 39, held that the county governing body of Jefferson County was authorized, pursuant to its general authority of control, to rent or lease the former courthouse site of Jefferson County. The governing body of that county leased the property for a period of fifty years. This lease was approved by the court. The court cited the case of *Jackson v. Ball et al*, 211 Ala. 273, 100 So. 327, as additional authority. Reference in the opinion was also made to Section 209, Code of 1923, which is now the afore-quoted Section 177, *supra*. This section of the code gives to the county governing body control over all property belonging to the county, and in my judgment, authorizes your governing body to sell the former courthouse site at private sale, and "in absence of fraud, corruption, or unfair dealing," your action will not be disturbed. *Board of Revenue of Covington County v. Merrill*, 193 Ala. 521, 68 So. 971.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 24, 1947.

Hon. Howard Kirby,
Clerk, Circuit Court,
Etowah County,
Gadsden, Alabama.

Clerks of Circuit Courts—Final Record—Indictments—Title 7, Sections 2, 5, Code of Alabama 1940—Title 13, Section 198, Code of Alabama 1940—Title 15, Section 252, Code of Alabama 1940.

The final record in a case commenced by indictment in the circuit court may be made at any time after the case is docketed and the defendant arrested. Title 13, Section 198, Subsection 9, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of September 13, 1947, is as follows:

"Please render to me your opinion on the following matter:

"In cases commenced by Indictment I have been making Final Record as required, which consists of the Indictment, Writ of Arrest, Bond and the Organization of Court. This has been done after Judgment.

"Wouldn't it be legal for me to make such Final Record after a case has been docketed and not have to wait until after judgment is entered?"

In my judgment, the final record in a case commenced by indictment may be made by the clerk of the court after the case has been docketed, provided the defendant has been arrested. When an indictment is returned in the circuit court, the clerk is required by law to secretly record the indictment and endorsements thereon, which records must be kept secret until the arrest of the defendant. Title 15, Section 252, Code of Alabama 1940. This secret record, however, is not the final record as referred to in your inquiry.

The statute requiring a final record to be made by the clerk of the circuit court in criminal cases is Title 13, Section 198, Code of Alabama, 1940, which provides in part as follows:

"It is the duty of the clerk of the circuit court:9. To record in well-bound books within six months after the final de-

termination of any suit or prosecution, all the proceedings relating thereto, not previously recorded under Section 5 of Title 7, except the subpoenas, affidavits for continuance, commissions to take testimony, evidence and executions.” See *Carmichael v. Matthews*, 134 Ala. 210, 32 So. 681.

Of course, the original pleadings in civil suits are recorded under the provisions of Title 7, Section 5, Code of Alabama 1940, but in criminal cases there have been no papers previously recorded under that section. *Carmichael v. Matthews*, 134 Ala. 210, 32 So. 681.

In my judgment, Subsection 9 above quoted requires that a final record (including all of those proceedings and entries not recorded upon the minutes of the court under Title 7, Section 2, Code of Alabama 1940) be made within six months after the final determination of the prosecution. This subsection sets a time limit within which the clerk must make his final record. It does not prohibit the clerk from making his final record at any time prior to the expiration of six months. It is my judgment, therefore, that the clerk may proceed to make and complete his final record in a criminal case before final judgment is entered after the case has been docketed. The provisions of Title 15, Section 252, Code of Alabama 1940, however, would require the clerk to wait until the defendant had been arrested before making his final record in the case, because this section requires the indictment to be kept secret until that time.

I have not gone into the question of the effect of the making of the final record preceding the judgment entry in relation to the collection of fees by the clerk. It appears to me, however, that the clerk would collect the same fees for making the final record regardless of the time at which such record is made, but the source from which such fees are paid would depend upon the final judgment rendered.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 24, 1947.

Honorable Roy O. Hill,
Clerk Circuit Court,
Houston County,
Dothan, Alabama.

Inferior Court of Houston County—Jurisdiction—Costs and Fees—Judges—Clerks—Sheriffs—Witnesses—Appeals—Bonds—Act No. 315, Local Acts 1947, approved August 13, 1947.

Act No. 315, approved August 13, 1947, (Local Act in manuscript), creating and establishing the Inferior Court of Houston

County, Alabama, construed generally as to its jurisdiction, the proper costs and fees (including witness fees) attachable therein and disposition thereof, the powers and duties of the judge, clerk and sheriff, appeals therefrom and the approval of appeal bonds, and the transfer of causes thereto.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of August 14, 1947, is as follows:

"Under a Local Act of 1947, a new court has just been created for Houston County, which is called: 'The INFERIOR COURT OF HOUSTON COUNTY, ALABAMA,' and there are a good many matters that should be clarified before this court begins to operate, and it is therefore respectfully requested that you give me an opinion on the following questions as soon as possible.

"1. Does the Judge of such INFERIOR COURT have preliminary jurisdiction? (Sec. 2-a) (3-e). Would a witness in such preliminary hearing be entitled to 50¢ and no mileage, or to 75¢ and mileage?

"(a) If the Judge has preliminary jurisdiction, would the clerk be entitled to a fee of \$2.00, for the use of the County, as is allowed the Clerk of the County Court, or would the costs be figured for the judge, for the use of the County, on J.P. scale of fees?

"2. Is it possible for a Justice of the Peace to issue a warrant returnable to the INFERIOR COURT OF HOUSTON COUNTY, ALABAMA? (sec. 8)

"3. Under Section 7 (b-5), should \$1.00 be included in cost bill for affidavit and warrant and \$5.00 for trial, etc., which is allowed the Judge of the County Court, when warrant is issued by the Judge of the INFERIOR COURT? Should \$5.00 be included when warrant is issued by the Clerk?

"(a) If the Clerk takes the affidavit and issues the warrant, what fee should be taxed against the defendant for this service?

"4. In a bastardy case in THE INFERIOR COURT, should costs be taxed under the Justice of the Peace scale of fees or County Court scale of fees?

"5. In an unlawful detainer, or suit for the recovery of land, in THE INFERIOR COURT, should costs be taxed under the Justice of the Peace or Circuit Court scale of fees?

"6. In detainee cases in THE INFERIOR COURT, should costs be taxed under the Justice of the Peace scale of fees or Circuit Court scale of fees?

"7. Under Section 7 (a), would the fees of a State witness in a criminal case be payable out of the General Fund of Houston County as is provided for fees of State witnesses in County Court to be paid under Local Acts of 1945, Page 20? Please note that the Local Act of 1945 provides for the payment of fees of such witnesses in County Court of the General Fund, and this Court is created in lieu of County Court.

"8. In the event the answer to the above question is in the affirmative, should the Clerk deposit all witness fees collected in criminal cases in the General Fund as is now done with witness fees collected in County Court?

"9. The Act creating the INFERIOR COURT fails to give disposition of fines and forfeitures which may be collected by the Clerk. Please advise what disposition should be made of such funds, when collected.

"10. Does this Act give the Judge of THE INFERIOR COURT authority to sentence defendants to hard labor for fine and costs in all criminal cases?

"11. If a defendant is sentenced to hard labor for fine and cost, will the State Department of Corrections & Institutions pay costs on the same scale and in the same way and manner as it now pays for defendants sentenced to hard labor from County Court?

"12. Can a civil or criminal case be appealed from a Justice of the Peace Court to THE INFERIOR COURT OF HOUSTON COUNTY, ALABAMA?

"13. Can a defendant in a criminal case demand a jury trial and have the case sent to the Circuit Court for Grand Jury investigation as is done in Justice of the Peace Courts?

"14. When a civil case is appealed from the INFERIOR COURT to the Circuit Court, should the appeal bond be approved by the Clerk or Judge of the INFERIOR COURT?

"15. When a civil case is appealed from the INFERIOR COURT to the Court of Appeals of Alabama, should the appeal bond be approved by the Clerk or Judge of the INFERIOR COURT?

"16. When a criminal case is appealed from the INFERIOR COURT to the Circuit Court, should the appeal bond be approved

by the Clerk or Judge of the INFERIOR COURT, or by the Sheriff.

"17. When a criminal case is appealed from the INFERIOR COURT to the Court of Appeals of Alabama, should the appeal bond be approved by the Clerk or Judge of the INFERIOR COURT, or by the Sheriff.

"18. The sheriff has on hand a good many warrants of arrest issued by the County Court Judge returnable to County Court, which he has been unable to execute because of temporary absence from the County of the defendants. When these warrants are executed, will it be proper to docket these cases on the INFERIOR COURT docket and for the Sheriff to take bonds returnable to THE INFERIOR COURT?

"19. In the pending cases that have been transferred from County Court to THE INFERIOR COURT, will it be proper to have a Solicitor's fee charged in County Court and another in THE INFERIOR COURT? Or to charge \$5.00 Judge's trial fee in County Court and the same item in THE INFERIOR COURT?"

The Inferior Court of Houston County, Alabama, was created and established under the provisions of Act No. 315, approved August 13, 1947 (Local Act in manuscript). Before specifically answering your inquiries it is deemed expedient to quote certain provisions of the act applicable thereto, which provide as follows:

"Section 1. INFERIOR COURT CREATED. There is hereby established in Houston County a court with county-wide limited jurisdiction of criminal cases and civil actions at law and in equity, which court shall make final records in all cases except cases cognizable before justices of the peace. The court shall be known as 'The Inferior Court of Houston County, Alabama.' It shall be in lieu of the county court, which is hereby abolished.

"Section 2. JURISDICTION. (a) Except as provided in Subsection (b), the court shall have power to exercise jurisdiction in all actions, causes, matters, proceedings and cases (including bastardy proceedings, actions for unlawful detainer and for the recovery of possession of land), cognizable before the Circuit Court, or a county court, or the juvenile court, or justices of the peace, or courts created in lieu thereof, and all courts of like jurisdiction. It shall have authority to exercise general superintendence of justice courts, and to punish contempts by fine not exceeding fifty dollars (\$50) and imprisonment not exceeding five days. It may adopt and enforce rules and regulations relative to pleadings, procedure, and practice, provided such rules and regulations are not contrary to the Constitution and statutes of the State and law-made rules governing the practice and procedure of courts of record. (b) The court shall not

have power to try persons charged with felonies. It shall not have jurisdiction of any civil action when the matter or sum in controversy exceeds one thousand dollars (\$1,000) nor take cognizance of any matter or proceeding in equity, except suits for divorce or separate maintenance and cases involving domestic relations or the custody of children.

"Section 3. JUDGE.

* * * * *

"(e) The judge shall have authority to (1) grant writs of certiorari, supersedeas, quo warranto, mandamus, and all other remedial and original writs which are granted by the circuit judges; (2) grant writs of injunction, and ne exeat; (3) administer oaths and take acknowledgments; (4) issue search warrants; (5) exercise such other powers, jurisdiction, or authority as may now or hereafter be conferred by law upon circuit judges, judges of juvenile and county courts, and justices of the peace. Provided, however, the judge shall not have or exercise the powers, jurisdiction, or authority of equity courts except in suits for divorce or separate maintenance, and cases involving domestic relations or the custody of children. * * *

"Section 7. COSTS. (a) For their attendance upon the sessions of the court, witnesses shall be entitled to the fees and allowances prescribed by law for witnesses in the circuit court, which fees and allowances shall be taxed, collected and paid in the same manner and according to the same regulations as apply in the circuit courts. (b) In addition to fees for witnesses, the court shall have authority to tax costs for the use of the county as follows: (1) in each civil action at law, if the sum in controversy does not exceed one hundred dollars (\$100), the same as in justice courts; (2) in every other civil action at law, the same as in the circuit court; (3) in each equity case, the same as in the circuit court; (4) in each criminal case involving an offense of which justice of the peace have final jurisdiction, the same as in justice courts; (5) in every other criminal case, the same as in the county court. (c) A trial tax of one dollar (\$1.00) shall be collected for the use of the county in each civil action at law, if the sum in controversy does not exceed one hundred dollars (\$100). In every other civil action at law, in every suit in equity, and in every criminal case, a trial tax of three dollars (\$3.00) shall be collected for the use of the county. (d) No costs shall be taxed in juvenile cases.

"Section 8. CRIMINAL PROSECUTIONS. (a) No prosecution shall be commenced in such court except upon sworn complaint made to either the judge or the clerk of the court, who shall issue a warrant of arrest if he is reasonably satisfied that the offense has been committed and that there is reasonable cause to believe that the accused is guilty. When the accused is arrested, the case shall be docketed for trial and the trial shall be held and conducted as trials after indictment. * * *.

"Section 9. APPEALS. Any party aggrieved by a judgment, order or ruling of the court may appeal the decision as herein provided. 1. If the case is a civil case in the law division of the court, the appeal lies to the circuit court and shall be governed by Article 6 of Chapter 8, Title 13 of the 1940 Code, or to the Court of Appeals and shall be governed by Article 1 of Chapter 3, Title 13 of the 1940 Code. 2. If the case is in equity, the appeal lies directly to the Supreme Court of Alabama and shall be governed by the provisions of Chapter 16, Title 7 of the 1940 Code. 3. If the case arises under the court's jurisdiction with respect to juveniles, the appeal lies to the circuit court and shall be governed by Sections 371 and 372 of Title 13 of the 1940 Code. 4. In every criminal case, the appeal lies to the circuit court and shall be governed by Section 349 of Title 13 of the 1940 Code, or to the Court of Appeals and shall be governed by Section 90 of Title 13 of the 1940 Code.

* * * * *

"Section 11. CLERK AND REGISTER. (a) The circuit clerk of Houston County and the register of the circuit court shall be the clerk and register, respectively, of the court herein established. * * *

"(c) The clerk and register, respectively, shall have power and authority: (1) to administer oaths and take acknowledgments and affidavits; (2) to sign and issue all processes issuing out of the court, including warrants, affidavits, summonses, subpoenas, writs, executions, commitments and releases; (3) to approve bonds in civil and criminal cases; (4) to enter all judgments, orders and decrees of the court; (5) to certify all appeals and transcripts; (6) to exercise all powers and authority which are now or may be hereafter, conferred on clerks and registers of the circuit courts.

"Section 12. TRANSFER OF PENDING CASES. All cases and actions pending in the county court on the effective date of this Act shall be transferred to the court herein created and shall proceed as though begun therein. As to judgments rendered by the abolished court, this court shall have the same power to control, and may issue executions and other processes thereon in all respects as though the judgments had been rendered by it. * * * * *

In my judgment, the first part of your first inquiry should be answered in the affirmative. The Judge of the Inferior Court of Houston County is a committing magistrate with preliminary jurisdiction by virtue of Title 15, Section 399, Code of Alabama 1940. When he is sitting in a preliminary hearing, he does not sit as the Judge of the Inferior Court of Houston County, but simply as a committing magistrate, and this is true of all the officers designated in said section.—Quarterly Report of Attorney General, Vol. 4, page 27.

In answer to the second part of your first inquiry, it is my opinion that the witnesses in such preliminary hearings would be entitled to a fee of 50¢ and no mileage under Title 11, Section 112, Code of Alabama 1940.—Biennial Report of Attorney General, 1930-32, page 603.

In answer to your inquiry marked 1 (a), it is my opinion that the Clerk of the Inferior Court of Houston County would not be entitled to the fee of \$2.00 for the use of the county. This \$2.00 fee is allowed the clerk of a county court when acting as clerk to the judge of said county court, when said judge is sitting as a committing magistrate, by virtue of Title 11, Section 91, Code of Alabama 1940. The local act in question contains no authority for the Judge of the Inferior Court of Houston County to act as a committing magistrate; rather his authority to act as such is derived from the general law granting such power to judges of inferior courts. The Clerk of said Court is under no duty to attend or perform any service in connection with preliminary hearings. Title 15, Sections 135 and 136, Code of Alabama 1940 impose all necessary duties on the committing magistrate himself.—Quarterly Report of Attorney General, Vol. 36, page 32; Quarterly Report of Attorney General, Vol. 10, page 10. The costs in such preliminary hearings are imposed under and subject to the limitations of Title 11, Section 84, Code of Alabama 1940, as amended by Act No. 58, General Acts 1945, page 59, approved June 1, 1945, on the justice of peace scale of fees.

In my opinion, your second inquiry should be answered in the negative. Section 8 (a) of Act No. 315, supra, specifically provides that no prosecution shall be commenced except upon sworn complaint made either to the Judge or Clerk of the Court.

In my opinion, both parts of your third inquiry should be answered in the affirmative.

Under Section 7 (b) (5) of Act No. 315, supra, costs are taxed for the use of the county the same as in county courts. The \$1.00 fee for affidavit and warrant and the \$5.00 fee for trial, etc. are provided for in Title 11, Section 987, Code of Alabama 1940, as part of the fees in county courts when the services are performed by the judges thereof. Under the local act in question the Judge of the Inferior Court has the same power as judges of county courts. In order to give Section 7 (b) (5), supra, a field of operation the Judge of the Inferior Court stands in the shoes of a judge of a county court, and is tantamount thereto, in so far as Title 11, Section 87, supra, is concerned. The \$5.00 fee for trial, etc. is for services performed by the judge and attaches regardless of who issues the warrant.

In answer to your inquiry numbered 3 (a), it is my opinion that the fee of \$1.00 for taking affidavit and issuing warrant attaches even though the Clerk performs this service. Under Section 11 (c) (1) and (2) of Act No. 315, supra, the Clerk has this authority. I do not think it was the legislative intent that different costs should attach in the same type of cases when the services in regard to affidavits and warrants are performed by the Judge of the Inferior Court in the one instance and by the Clerk in another. The Clerk is merely acting for the Judge in this respect.

In answer to your fourth inquiry, it is my opinion that the costs should be taxed the same as in other bastardy proceedings. The Judge of the Inferior Court of Houston County in such proceedings acts in a dual capacity, as a Justice of Peace in the preliminary hearing, and as Judge of the Inferior Court thereafter, since he has specific final jurisdiction in bastardy proceedings. The costs accruing the preliminary hearing should be based on the Justice of Peace scale of fees, and in the final hearing on the Circuit Court scale of fees. A prosecution for bastardy is neither strictly civil nor strictly criminal, but partakes of the nature of both, and is rather of a quasi-criminal character. Cf. Biennial Report of Attorney General 1930-32, page 665 and authorities cited therein.

In answer to your fifth and sixth inquiries, it is my opinion that the costs should be taxed under the Circuit Court scale of fees if the amount in question exceeds \$100.00, and if it does not, the Justice of Peace scale of fees applies.

In answer to your seventh inquiry, it is my opinion that the witnesses in criminal cases in the Inferior Court of Houston County are paid in accordance with Section 4 of Act No. 17, Local Acts 1945, page 20, approved May 19, 1945. Said Section applies to criminal cases in the Circuit Court and County Court of Houston County. It will be noted under Section 7 (a) of Act No. 315, *supra*, that the fees and allowances of witnesses shall be taxed, collected and paid in the same manner and according to the same regulations as apply in the circuit courts, which includes the Circuit Court of Houston County. Moreover, the Inferior Court of Houston County was created in lieu of the County Court of said county.

In my opinion, your eighth inquiry should be answered in the affirmative.—Section 6 of Act No. 17, *supra*.

In answer to your ninth inquiry, it is my opinion that the disposition of the fines and forfeitures in the Inferior Court of Houston County should be governed by the general laws of the state, as the Local Act creating said Court fails to provide for any disposition thereof. However, since the fine and forfeiture fund of Houston County has been abolished by Act No. 17, *supra*, the disposition of the fines and forfeitures that inure to the benefit of Houston County are governed by said act.

I am of the opinion that your tenth inquiry should be answered in the affirmative. The Inferior Court of Houston County has the same jurisdiction as county courts and circuit courts (felonies excepted) in regard to criminal cases, which courts have authority to sentence to hard labor for costs. The provisions relative to justice of peace jurisdiction deal only with taxation of costs in certain cases of which justices of peace have jurisdiction, and not to the manner or method of collection thereof.

I am also of the opinion that your eleventh inquiry should be answered in the affirmative. As above stated, the Inferior Court of Houston County assumes jurisdiction of the County Court of said county and was created in lieu thereof. The rules applicable to payment of certain fees by the state in county courts are applicable to the Court under consideration.

I am of the opinion that your twelfth inquiry should be answered in the affirmative. Under Section 2 (a) of Act No. 315, *supra*, the Inferior Court of Houston County, with the exception of cases under 2 (b), has the power to exercise jurisdiction in all actions, causes, matters, proceedings and cases cognizable before circuit courts and stands in the shoes of the circuit court in this respect.

I am of the opinion that your thirteenth inquiry should be answered in the negative. The Inferior Court of Houston County tries all misdemeanor cases as in the County Courts. One so charged may not demand a jury trial and have the case sent to the Circuit Court for grand jury investigation. If dissatisfied with the verdict of the Inferior Court, he may appeal to the Circuit Court or Court of Appeals under Section 9 of Act No. 315, *supra*.

Your fourteenth, fifteenth, sixteenth and seventeenth inquiries, being closely related, will be answered together rather than categorically. Appeals from the Inferior Court of Houston County are governed by Section 9 of Act No. 315, *supra*.

In all of the types of appeals in question, the Clerk may approve the appeal bonds under Section 11 (c) (3) of Act No. 315, *supra*.

When civil cases are appealed to the Circuit Court, the Judge also has the authority to approve the appeal bonds. Such appeals are governed by Title 13, Chapter 8, Article 6 (Sections 477-492), Code of Alabama 1940, which is applicable to appeals from Justice Courts or courts of like jurisdiction, where the appeal bonds may be approved by the judge thereof.

Criminal appeals to the Circuit Court are governed by Title 13, Section 349, Code of Alabama 1940, which is applicable to appeals from county courts to circuit courts. This section gives the judges of the county courts specific authority to approve the appeal bonds. In my opinion, the Judge of the Inferior Court of Houston County has this same authority.

In criminal cases appealed either to the Circuit Court, or to the Court of Appeals, the sheriff has authority to approve the appeal bonds.—Quarterly Report of Attorney General, Vol. 38, Page 48.

I am unable to find any authority for the approval of the appeal bonds by the Judge in cases, either civil or criminal, appealed from the Inferior Court of Houston County to the Court of Appeals.

Your eighteenth inquiry should be answered in the affirmative. Section 12 of Act No. 315, *supra*, is specific authority for such action.

I am of the opinion that both parts of your nineteenth inquiry should be answered in the negative. Section 12 of Act No. 315, *supra*, provides for the transfer of cases to the newly created Court as if the proceedings had begun therein. In my judgment, it would be improper to charge fees both in the former county court and in the newly created Inferior Court. The fees should be charged only in the new Court.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 26, 1947.

Honorable Lawrence Moss,
License Inspector, Etowah County,
Gadsden, Alabama.

Licenses—Osteopaths and Chiropractors. Title 51, Section 565, Code of Alabama 1940.

A person actively engaged in the practice of his profession as an osteopath or chiropractor, and who has been engaged in the practice of such profession for two years or more, is required to pay the license fee prescribed by Title 51, Section 565, Code of Alabama 1940, as a prerequisite to engaging in the practice of such profession.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion under date of April 9, 1947, is as follows:

"In Hand Book of Laws relating to and fixing amount of Privilege License, Page 45, Section 565, gives the amount of Privilege fees to be paid by Osteopaths and Chiropractors. The amount stipulated is Twenty dollars to the State and nothing to the County, and fifty cents issuance fee, making a total of twenty dollars and fifty cents. Upon presenting citations to a local Chiropractor, he informed me that the rules were not for them to pay a privilege license that certain laws did not protect him in his profession. In case he waited on a patient on credit and the patient refuses to pay, he has no means of collection.

"Question.

"Is he entitled to pay or not?"

The following statutes are pertinent to your inquiry. Title 51, Section 450, Code of Alabama 1940, which statute provides as follows:

"§450. Who must procure state and county licenses.—Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engaged in any business, vocation, occupation, calling or profession herein enumerated, or who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a state license, and a county license when so required, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all other provisions of this title. (1935, p. 256)"

Title 51, Section 565, Code of Alabama 1940, which statute in prescribing the license fee to be paid by practicing osteopaths and chiropractors provides as follows:

"§565. Osteopaths and chiropractors.—Each osteopath or chiropractor practicing his profession shall pay an annual license of twenty dollars to the state, but no license shall be paid to the county. If such business is conducted as a firm, or corporation in which more than one person is engaged, each osteopath, or chiropractor so engaged shall pay a license of twenty dollars, provided further, that no osteopath or chiropractor shall be required to pay a license until after he has practiced his profession for two years. (1935, p. 256.)"

In view of the above statutes, it is my opinion that any person practicing his profession as an osteopath or chiropractor is required to pay the license fee prescribed by Section 565, supra, the single exception to such rule being that persons practicing such professions shall not be required to pay the license fee prescribed therefor until after they have practiced such profession for two years. In my opinion the argument stated by you in your letter to have been advanced by a certain chiropractor with reference to his exemption from the payment of such license fee contains neither logic nor merit and certainly is not grounds for exemption from the payment of such fee.

It is, therefore, my opinion that if the person mentioned by you in your letter is in fact a person actively engaged in the practice of his profession as an osteopath or chiropractor, and has been engaged in such practice for two years or more, he is required to pay the license fee prescribed by Section 565, supra, before being authorized to practice such profession.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 26, 1947.

Hon. Tom B. Ward,
County Attorney,
Tuscaloosa County,
Tuscaloosa, Alabama.

Deputy Solicitors—Increase in salary—Act No. 11, Local Acts 1947, approved June 19, 1947—Title 13, Section 256, Code of Alabama 1940—Title 13, Section 257, Code of Alabama 1940, as amended by Act No. 327, General Acts 1945, page 531—Constitution of Alabama 1901, Sections 68, 281, 105, 96 and 104 (24).

1. Under Title 13, Section 256, Code of Alabama 1940, a deputy solicitor does not have a "term of office" within the meaning of Constitution of Alabama 1901, Sections 68 and 281.

2. Since Title 13, Section 257, Code of Alabama 1940, as amended by Act No. 327, General Acts 1945, page 531, which deals with the salary of a deputy solicitor, does not purport to apply in any county where the salary of the deputy solicitor is fixed by a local law, a local law fixing the salary of the deputy solicitor is not violative of Constitution of Alabama 1901, Section 105.

3. A salary payable to an officer is not a fee, commission, percentage or allowance within the meaning of Constitution of Alabama 1901, Sections 96 and 104 (24).

4. Act No. 11, General Acts 1947, approved June 19, 1947, which provides for an increase in the salary of the Deputy Solicitor of Tuscaloosa County, effective immediately, does not violate Constitution of Alabama 1901, Sections 68, 281, 105, 96 or 104 (24), even though the so-called additional duties sought to be placed upon such deputy solicitor by said act are not bona fide additional duties.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of June 26, 1947, is as follows:

"Mr. Matt T. Maxwell, Secretary of the Board of Revenue of Tuscaloosa County, Alabama, asked us to advise him whether or not House Bill Number 47, which has been passed by the Legislature and was approved on June 19th, 1947, was a constitutional bill and duly and legally adopted, and whether or not it authorized the Board of

Revenue to pay the additional increase in salary to the present County Solicitor.

"We explained to Mr. Maxwell that it is our present judgment that this bill was sufficient to authorize the payment of the increase in salary to the present County Solicitor. We further explained, however, in order for the Board of Revenue to be fully protected it would be necessary for the Attorney General to say whether or not this bill is constitutional and has been duly and legally adopted and whether or not it authorized the Board of Revenue to pay this additional salary to the County Solicitor.

"We are, therefore, in behalf of the Board of Revenue of Tuscaloosa county asking you to give your opinion whether or not this bill is all right and authorizes the Board of Revenue to pay this additional salary to the County Solicitor."

House Bill No. 47 that you refer to is Act No. 11, Local Acts 1947, approved June 19, 1947. This act amends Sections 10 and 11 of Act No. 228, Local Acts 1927, p. 130, by outlining so-called additional duties for the Deputy Solicitor of Tuscaloosa County and by increasing his salary from \$1800 per annum to \$3000 per annum. In my opinion, the so-called additional duties sought to be placed upon the Deputy Solicitor by this act are not bona fide additional duties, such as would justify an increase in compensation immediately, if such Deputy Solicitor has a "term of office." See opinion to Hon. Herman K. Longshore, Judge of Probate, Lauderdale County, Florence, Alabama, under date of September 18, 1947, a copy of which is enclosed for your information.

It is my opinion that this act is constitutional.

Title 13, Section 256, Code of Alabama 1940, reads as follows:

"Deputy Solicitors appointed; removal.—The several circuit solicitors, except as otherwise provided by law, shall appoint a deputy solicitor in each county of his circuit, to represent the state in all cases in the county court and inferior courts, and all preliminary proceedings, applications for bail and habeas corpus proceedings in all courts, aid or act for the circuit solicitor before the grand jury and in all matters in the circuit court when requested to do so by the circuit solicitor, and perform all the duties of the circuit solicitor in his absence when so directed by the circuit solicitor, and such deputies may be removed by the circuit solicitor at pleasure."

Title 13, Section 257, Code of Alabama 1940, as amended by Act No. 327, General Acts 1945, p. 531, reads as follows:

"Salary of deputy solicitor.—Unless otherwise provided by a local law, the deputy solicitor of the county shall be paid by the

county an annual salary of twelve hundred dollars, on the warrant of the probate judge, which salary shall be in lieu of all fees, or compensation heretofore allowed by law to such deputy solicitor; provided, that in each county where a circuit or county court is held at more than one place in the county, the deputy solicitor shall receive an annual salary of fifteen hundred dollars; provided further, that in all counties having a population of more than forty thousand, according to the 1940 federal census, or any subsequent federal census, the deputy solicitor shall be paid by the county an annual salary of eighteen hundred dollars."

It can be seen that Section 256, *supra*, provides for the removal of the deputy solicitor at the pleasure of the circuit solicitor. The authorities are in accord that a deputy, appointed by an officer to hold office at the pleasure of such principal, does not have a "term of office" within the meaning of constitutional inhibitions directed against the increase of compensation of an incumbent during his term of office. "Term of office" is held to apply only to those incumbents having a fixed and definite term and does not apply to appointive officers holding office only at the pleasure of the appointing power. 41 Words and Phrases, pages 389, 390, 391 and cases cited therein.

Considered in the above light, Constitution of Alabama 1901, Sections 68 and 281 would not be applicable.

Section 68 reads as follows:

"The legislature shall have no power to grant or to authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant any extra compensation, fee, or allowance to any public officer, servant, or employee, agent or contractor, after service shall have been rendered or contract made, nor to increase or decrease the fees and compensation of such officers during their terms of office; nor shall any officer of the state bind the state to the payment of any sum of money but by authority of law; provided this section shall not apply to allowances made by commissioners' courts or boards of revenue to county officers for ex officio services, nor prevent the legislature from increasing or diminishing at any time the allowances to sheriffs or other officers for feeding, transferring, or guarding prisoners." Section 281 reads as follows:

"The salary, fees, or compensation of any officer holding any civil office of profit under this state or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

It is also noted in Title 13, Section 257, Code of Alabama 1940, as amended, *supra*, that the general law fixes the salary of deputy solicitors

but prefaces the statute with the phraseology "unless otherwise provided by a local law." Therefore, Constitution of Alabama 1901, Section 105 is not applicable.

Section 105, *supra*, reads as follows:

"No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the legislature indirectly enact any such special, private, or local law by the partial repeal of a general law."

Other constitutional sections considered are Constitution of Alabama 1901, Sections 96 and 104 (24).

Section 96, *supra*, reads as follows:

"The legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

Section 104 (24), *supra*, reads as follows:

"The legislature shall not pass a special private or local law in any of the following cases:

"(24) Creating, increasing or decreasing fees, percentages or allowances of public officers."

The decision of the Supreme Court of Alabama in the case of **Brandon, Auditor v. Askew, Solicitor**, 172 Ala. 160, 54 So. 605 is directly applicable to the instant case. This decision held that a local or special act fixing the salary of the circuit solicitor was not violative of Constitution of Alabama 1901, Sections 96 and 104 (24) by reason of the fact that a "salary" is not a fee, commission, percentage, or allowance within the meaning of constitutional provisions 96 and 104 (24).

From a consideration of all of the constitutional sections discussed herein, it is my opinion that Act No. 11, *supra*, is constitutional and you are so advised.

In your request for an opinion, you did not specify any particular sections of the Constitution which you desired considered. I have considered all sections which said act might possibly violate, except those sections relating to the passage of local laws. Since no point is raised

in this regard, and the journals of the Legislature are not presently available, no consideration has been given to those sections.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 26, 1947.

Hon. Gordon Persons, President,
Alabama Public Service Commission,
CAPITOL.

Public Service Commission—Railroads—Title 48, Sections 18,
104, 105 and 110, Code of Alabama 1940.

Railroads changing straight passenger service to "mixed train" service must obtain prior authorization of Alabama Public Service Commission.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of July 14, 1947, is as follows:

"Title 48, Section 106, 1940 Code reads as follows:

"PERMIT TO ABANDON SERVICE—No transportation company subject to this chapter shall abandon all or any portion of its service to the public, except ordinary discontinuances of service for non-payment of charges, non-user, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment."

"One Alabama Railroad which formerly operated a passenger train each way, each day, between two points, has recently substituted a so-called 'mixed train' for this straight passenger train. This 'mixed train' consists of both passenger and freight cars and the Railroad takes the position that such a change does not require approval from the Public Service Commission, on the grounds that service to the public has not been materially affected. Obviously, such a move does not constitute 'abandonment' of service.

"Will you please, therefore, give us a formal opinion as to whether or not such a change, as outlined above, requires prior authorization from the Public Service Commission.

"The subject of U. S. mail does not enter into the situation, as this Commission, of course, has no authority over the routing of mail."

Under the powers and duties in general given the Public Service Commission, the following is noted at Title 48, Section 18, Code of Alabama 1940:

"The public service commission shall have general supervision of all persons, firms, corporations, operating utilities, mentioned in this title, * * * * *."

In Title 48, Section 104, Code of Alabama 1940, the following statutory law is incorporated:

"The public service commission is charged with the duty of supervising, regulating, and controlling, all transportation companies doing business in this state, in all matters relating to the performance of their public duties, * * * * *."

Unquestionably, it was the intent of the Legislature in creating the Commission to bestow upon the Commission broad powers in the supervision and control of public service corporations and business enterprises devoting their property to public use. Section 18, *supra*, places all railroads under the supervision of the Commission, and Section 104, *supra*, specifically makes it the duty of the Commission to supervise, regulate and control them in the performance of their public duties. The authority to supervise thus being existent, and the duty to do so being mandatory, it is my opinion that the Commission has the authority to require prior authorization for a change from a straight passenger train service to a "mixed train" service such as you outline.

The Commission has been given statutory authority to adopt rules and regulations. Title 48, Section 22, Code of Alabama 1940. In order that the rail carriers may be definitely advised on the position of the Commission in this matter, it is my opinion that a well considered action would be for the Commission to adopt a rule or regulation requiring that a change from straight passenger train service to a "mixed train" service first have the authorization of the Commission.

Further, it is my opinion that should freight service for which no certificate of public convenience and necessity has been issued be included in the passenger service offered by the formation of a "mixed train" as referred to, such change would of necessity require proper certificate of public convenience and necessity as being an "extension" of service.

Such a procedure is distinctly required by Title 48, Section 105, Code of Alabama 1940, which reads as follows:

"§ 105. Certificate of convenience and necessity.—No transportation company shall undertake the extension of its service or the construction of a new plant, property, or facility, except ordinary extensions in the usual course of business, or shall acquire or operate any line, plant, or property of another transportation company, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require, or will require, or the public interest will be best served by, such extension, construction, acquirement, operation, or acquirement and operation." (Emphasis supplied)

The facts you state in the case referred to in your request for an opinion reveal one Alabama railroad has already changed its passenger service to that of "mixed train" service without authorization from the Commission. It is my opinion that Title 48, Section 110, Code of Alabama 1940, would directly apply in such a case and that a hearing could be had in which the Commission could authorize "mixed train" service or order a change back to straight passenger service.

Section 110, *supra*, reads as follows:

"§ 110. Repairs and improvements of facilities and property of transportation companies.—If, in the judgment of the public service commission, repairs or improvements to or changes in any trains, switches, terminals, or terminal facilities, motive power, or any other property or device used by any transportation company, subject to the supervision of the public service commission, in or in connection with the transportation of passengers, freight or property, ought reasonably to be made, or that any additions should reasonably be made thereto, in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for the transportation of passengers, freight or property, the commission, shall after a hearing had either on its own motion or after complaint filed, made and enter an order directing such repairs, improvements, changes or additions to be made within a reasonable time and in a manner to be specified therein, and every transportation company subject to the supervision of said commission shall make all such repairs, improvements, changes and additions required of it by any order of the commission served on it, and any transportation company that shall fail, refuse, omit or neglect to obey any lawful order or requirement of the public service commission, for which a penalty has not been provided, shall forfeit to the State of Alabama a sum not exceeding two thousand dollars for each offense, to be fixed by the court or judge trying the case, and every such violation, failure, refusal, neglect, or omission, shall constitute a separate and distinct offense, and, in case of a continuing violation, each and every day's continuance thereof shall be a separate and distinct offense." (Emphasis supplied)

I do not think that Title 48, Section 106, Code of Alabama 1940, that you refer to, is applicable to the situation you outline. This opinion is

based on interpretations of statutory law above noted and you are herewith advised accordingly.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 29, 1947.

Hon. Lamar Kelly, Chairman,
Alabama Alcoholic Beverage Control Board,
Montgomery 2, Alabama.

Alcoholic Beverage Control Board—Appropriation to Commission on Education With Respect to Alcoholism—Act No. 115, General Acts 1945, page 108—Act No. 255, General Acts 1943, page 226—Title 29, Code of Alabama 1940.

The annual appropriation made to the Commission on Education with Respect to Alcoholism under the provisions of Act No. 115, General Acts 1945, page 108, should be made upon the basis of the calendar year rather than upon the basis of the state fiscal year.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of March 20, 1947, is as follows:

"Reference is made to Act 115 of the regular session of the 1945 Legislature approved June 16, 1945. This Act created the Commission on Education with Respect to Alcoholism and provided that an appropriation be made in the sum of five thousand dollars per annum to be paid from the funds of the Alcoholic Beverage Control Board.

"The fiscal year of the Alcoholic Beverage Control Board has been established as being the same as the calendar year. The fiscal year of the State runs from October 1 to September 30 of the following year.

"We respectfully request your opinion as to the definition of the year during which the appropriation of five thousand dollars should be paid from the funds of the ABC Board. We desire to know whether the fiscal year of the ABC Board or the fiscal year of the State applies to the Commission on Alcoholism."

Act No. 115, General Acts 1945, page 108, cited by you in your request for opinion, provides for the creation and establishment of a commission known as the Commission on Education With Respect to Alcoholism. Section 3 of such act provides as follows:

"Subject to the approval of the Governor, there is hereby appropriated annually the sum of five thousand (\$5000.00) to the said Commission to be expended in the promotion of its Objectives and in payment of the expenses of the Commission, said sum to be paid from the funds of the Alcoholic Beverage Control Board as a part of the operating expenses of the Board."

Your inquire as to whether such appropriation should be made upon the basis of the calendar year or upon the basis of the state fiscal year, which extends from October 1st to September 30th of the following year.

It is my opinion that the annual appropriation of five thousand dollars (\$5000.00) provided for by Section 3 of Act No. 115, supra, should be made upon the basis of the calendar year rather than upon that of the fiscal year of the state.

The statutory law of this state governing the operations of the Alcoholic Beverage Control Board is found in Title 29, Code of Alabama 1940, and certain subsequently enacted statutes of which the only one here pertinent is Act No. 255, General Acts 1943, page 226. These provisions evince a clear intention on the part of the Legislature that the official year for operations of the Alcoholic Beverage Control Board should be the calendar year rather than the fiscal year of the state, Act No. 255, supra, which act, in effect, supersedes Title 29, Sections 10 and 11, specifically provides for the distribution, in the manner therein provided, of the net profits derived from the proceeds of the Alabama liquor stores "in each calendar year." All other of these statutes evince a similar intent. CF.—Quarterly Report of Attorney General, Vol. 46, page 110.

Reference to the above quoted provisions of Act No. 115, supra, discloses that the annual appropriation therein provided for is to be paid from the funds of the Alcoholic Beverage Control Board as a part of the operating expenses of the Board. Inasmuch as the official year for the operations of the Alcoholic Beverage Control Board is the calendar year, with the net profits derived by such agency being distributed upon the basis of the calendar year, it is my opinion that the appropriation above provided for should also be made upon the basis of the calendar year. In my opinion, such appropriation bears no relation to the fiscal year of the state.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 29, 1947.

Hon. Haygood Paterson,
Commissioner,
Department of Agriculture and Industries,
CAPITOL.

Agriculture and Industries—Warehouses—Bonds—Records—
Photostatic Copies—Title 2, Sections 573, 574 and 576, Code of
Alabama 1940—Title 47, Section 97, Code of Alabama 1940.

1. Under provisions of Title 2, Section 573, Code of Alabama 1940, requiring bonds to be filed by public warehousemen, corporations operating chain of warehouses may file one bond applicable to all locations.

2. Whether or not each warehouse, part of a chain, is covered by full face value of one bond depends on terms of bond.

3. Under provisions of Title 2, Section 576, Code of Alabama 1940, the probate judge should be presented with original bond of warehousemen and not a photostatic copy. Such bond may be recorded by probate judge, however, by use of photostat machine.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of September 11, 1947, is as follows:

"We would appreciate your giving us an opinion or ruling on the following questions:

"(1) Are we within the law when we require of an out-of-state corporation operating a chain of warehouses storing products other than cotton, to file one bond made applicable to all locations?

"(2) Would each location be covered by the full face value of such a bond?

"(3) Are photostatic copies of such a bond acceptable within the law for recording by the Judge of Probate?

"Article 35, Title 2, Code of Alabama 1940 covers the bonding of public warehouses.

"The Examiners are auditing our books and we would like to have this information as soon as possible."

You are advised in answer to your question (1) that the Commissioner of Agriculture and Industries is within the law when he requires an out-of-state corporation operating a chain of warehouses storing products other than cotton to file one bond, provided that bond is in fact applicable to all locations.

In answer to your question (2), you are advised that each location or warehouse would be covered by the full face value of the bond, provided the terms of the bond so state. In other words, it depends on the contract or the bond.

In answer to your question (3), the judge of probate, in recording such bond should be presented with the original bond and not a photostatic copy thereof. The probate judge may record such bond by the use of a photostat machine.

Title 2, Sections 573 and 574, Code of Alabama 1940, requiring bonds of public warehousemen, are as follows:

"Sec. 573. Bond required of warehousemen.—In the event the commissioner decides that such permit to operate a warehouse should be issued, he shall fix the amount of the bond which shall be furnished by said applicant and approved by the commissioner prior to the issuance of said permit. Said bond shall be made with some surety company that has complied with the laws of the state of Alabama, and which has a reputation for promptly settling claims upon their merits, and shall be payable to the State of Alabama in such sum as the commissioner may fix, but in no event to be less than five thousand dollars. Said bond shall be conditioned upon the faithful performance of his, or its duties as a public warehouseman for the period covered by said permit and for a faithful compliance with all laws, rules and regulations relating to the operation of a public warehouse. The commissioner of agriculture may require the filing of additional bonds at any time by the warehousemen should the public interest demand and the failure to file any such additional bonds, within the time to be fixed by the commissioner, shall be sufficient cause for revoking the permit issued such warehouse."

"Sec. 574. Extra condition of bond.—The bond required of an applicant for permit to operate a public warehouse shall also undertake to pay to the State of Alabama all expenses of any successful litigation which the state institutes to compel a compliance with the laws and rules and regulations relative to public warehouses. Any person aggrieved because of the negligent conduct of any public warehouseman may sue on said bond in his own name for a breach thereof until the penalty is exhausted. In the event the penalty is exhausted, the commissioner shall require the filing of an additional bond, or revoke the permit heretofore issued."

Title 2, Section 576, Code of Alabama 1940, requiring bonds of public warehousemen to be recorded, is as follows:

"Sec. 576. Bond recorded.—Such bond shall be filed and recorded at the expense of the applicant by the commissioner in the probate office of the county in which the warehouse is located. The probate judge shall receive for his service in recording said bond fifteen cents per hundred words. The probate judge shall not have authority to issue a license to operate a public warehouse until said bond is recorded and the applicant for said license files with him the permit issued by the commissioner. Upon recording of said bond, it shall be returned to and filed in the office of the commissioner."

1. As you will note in Section 573, *supra*, the Commissioner of Agriculture and Industries fixes the amount of the bond required of warehousemen. As the above quoted statutes were written, they apply to each individual warehouse. Therefore, it is required that each individual warehouse, whether it is part of a chain of warehouses or not, be covered by a bond. I find no reason why a corporation operating a chain of warehouses may not take out one bond which covers each individual warehouse, provided that the bond covers each individual warehouse. The Commissioner in approving such bond should satisfy himself that the terms of the bond in fact provide that the bond is applicable to each warehouse in the chain, and further that the terms of the bond cover each warehouse at least to the extent of \$5,000.00 or whatever amount the Commissioner has fixed as the amount of the bond.

2. As stated above, each location or each warehouse would be covered by the full face value of the bond if the bond so provides. I am not furnished with a copy of the bond, and, therefore, I cannot advise you on this question. The bond could be so written that each location would be covered by the full value of the bond, but it could also be written so that each location or warehouse would be covered by only a part of the full value of the bond.

3. Section 576, *supra*, provides that this bond shall be filed and recorded in the probate office of the county in which the warehouse is located. In my judgment, the original bond should be presented to the judge of probate for such recording. In recording such bond, however, the judge of probate may use a photostat machine. Title 47, Section 97, Code of Alabama 1940. Quarterly Report of Attorney General, Vol. 27, p. 28. In my judgment it will be necessary, therefore, for the Commissioner to send the original bond to each county where a warehouse is located, there to be recorded by the probate judge.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

September 29, 1947.

Hon. Lecil Gray,
Judge of Probate,
Walker County,
Jasper, Alabama.

Filing Tax—Mortgages—Title 51, Section 619, Code of Alabama 1940.

Mortgage filing tax is payable on amount of indebtedness extended by extension agreement when same is offered for record.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of September 11, 1947, is as follows:

"Enclosed herewith please find an agreement filed in this office to extend as original mortgage filed here.

"This merely extends the original mortgage and in itself carries no consideration.

"Please advise me whether or not it is subject to the Mortgage Tax."

A part of the extension agreement provides as follows:

"WHEREAS, it is the desire of the parties hereto that the said mortgage should be acknowledged and said extension recorded in due course,

"NOW, THEREFORE, for a valuable consideration receipt of which is acknowledged, it is agreed that the said deed of trust and mortgage hereinabove referred to and appearing of record in the office of the Judge of Probate of Walker County, Alabama, in Mortgage Book 303, Folio 108, is declared to be extended for the full period permitted by law, and the said mortgage and the promissory notes hereinabove described and identified are hereby acknowledged as valid and binding obligations, * * * * *"

In my opinion, a mortgage filing tax should be paid on the amount of indebtedness extended by the extension agreement when said agreement is offered for record. The agreement indicates that \$900,000.00 is still due under the mortgage. However, you should ascertain how much is actually due under the mortgage, when the extension agreement is of-

ferred for record in your office, and base the mortgage filing tax on said amount.

Title 51, Section 619, Code of Alabama 1940, provides, in part, as follows:

§ 619. Mortgages, deeds of trust, etc.; recordation.—No mortgage, deed of trust, contract of conditional sale, or other instrument of like character which is given to secure the payment of any debt, which conveys any real or personal property situated within this state, or any interest therein, shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record to-wit: (a) Upon all such instruments which are executed to secure any indebtedness which shall not exceed one hundred dollars, there shall be paid the sum of fifteen cents, and upon all instruments which shall be executed to secure the indebtedness of more than one hundred dollars there shall be paid the sum of fifteen cents for each one hundred dollars of such indebtedness, or fraction thereof, which is secured by said mortgage, deed of trust, contract of conditional sale, or other instrument of like character, * * * * * (f) When the time for the payment of the indebtedness secured by any such mortgage, deed of trust, contract of conditional sale, or other instrument in the nature of a mortgage, is extended or renewed, and the extension or renewal contract is offered for record the tax required in this section shall be paid on the amount of indebtedness so extended or renewed; and the same be governed in all respects by the provisions of this article. * * * * *” (Emphasis supplied)

Your attention is invited to an opinion of this office in Quarterly Report of Attorney General, Vol. 8, p. 227, which holds that a mortgage tax should be collected on the balance due on a vendor's lien when said lien is extended by an extension agreement. See also Biennial Report of Attorney General, 1928-30, p. 325.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 29, 1947.

Hon. D. G. Gill, M. D.,
State Health Officer,
Department of Public Health,
CAPITOL.

Health and Health Department—Bureau of Vital Statistics—
Rules and Regulations—Public Records—Title 22, Section 7, Sub-
section 6, Code of Alabama 1940—Act No. 492, General Acts

1943, page 454—Title 41, Sections 145-147, Code of Alabama 1940.

1. Those records collected, recorded and preserved by the Bureau of Vital Statistics fall within the category of public records.

2. Every citizen has a right to inspect and take a copy of any public writing of the state, except as otherwise expressly provided by statute.

3. Those officers having custody of public writings, which a citizen has a right to inspect, are under a duty to furnish citizens certified copies of such records, upon payment of the fee prescribed by law.

4. The State Board of Health is without authority to promulgate rules and regulations restricting the right of inspection, abstracting and procurement of certified copies of public records to certain designated persons or agencies.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of August 8, 1947, is as follows:

"Subsection 6 of Section 7 of Title 22 of the 1940 Code of Alabama authorized the State Board of Health to adopt and promulgate rules and regulations providing proper methods and details for administering the health laws of the state.

"It will be appreciated if you will give your opinion as to whether the attached proposed rules and regulations governing disclosure, abstracts and copies of vital records constitute a valid exercise of this authority."

The rules and regulations which you propose be adopted by the State Board of Health are found attached to your request for opinion and are as follows:

"Section 1. Indiscriminate disclosure of vital records shall not be permitted by any person having temporary or permanent custody of such records.

"Section 2. State and Federal authorities, and official representatives of recognized private welfare agencies may be given personal data contained in vital records in the line of their duties.

"Section 3. The United States Public Health Service may obtain copies of vital records without expense to the State.

"Section 4. Any organization, firm or individual may obtain birth lists, without expense to the State, after satisfactory evidence has been submitted to the State Registrar of Vital Statistics to show that any and all lists as may be obtained shall be used exclusively for promoting public education, health and welfare. Provided that the State Health Officer may exercise his discretionary power to terminate immediately, with or without cause, any and all agreements entered into under these regulations.

"Section 5. 'Vital Records' as used herein consist of records of birth, death, stillbirth, marriage, divorce, adoption and legitimation which are controlled by the State Registrar.

"Section 6. These rules and regulations shall be in force and effect from and after October 1, 1947."

It is my interpretation of the above-quoted rules and regulations that the purpose thereof is to restrict the disclosure, abstracting and furnishing of copies of vital records to those persons designated and approved by the State Board of Health. This, in my opinion, the State Board of Health is without authority to do, either under the rule-making power of Title 22, Section 7, Subsection 6, Code of Alabama 1940 or under any other of the general powers granted the State Board of Health by Title 22, Code of Alabama 1940.

The statutory law governing the registering, recording and preservation of the vital records maintained by the State Board of Health is found set out in Title 22, Sections 19-42, Code of Alabama 1940, as amended by Act No. 492, General Acts 1943, page 454. Provision is made for the establishment of a central bureau of vital statistics under the jurisdiction and authority of the State Board of Health and sets out the manner by which the data defined as "vital statistics" shall be collected, recorded and preserved. Title 22, Section 42, as amended, *supra*, provides that the state registrar of vital statistics, upon request, shall supply to any applicant entitled to same a certified copy, under the seal of his office, of any of the records registered by him and maintained within his office as "vital statistics."

It is also significant to note that the amended Code sections specifically define those records collected, recorded and preserved by the state registrar as public records. Such definition is found within Title 22, Section 37, as amended, which provides, in part, as follows:

" . . . The state board of health shall arrange, bind, and permanently preserve the certificates in a systematic manner, and shall prepare and maintain a comprehensive and continuous typewritten

or printed index of all births and deaths registered. After the said certificates are processed and filed as permanent public records any person who shall wilfully alter any certificate, or entries thereon, or the copy of any of these public records on file in the office of the state registrar, except through due process of the state law that authorizes such alterations, shall be deemed guilty of violation of Section 103 of this Title. . . .” (Emphasis supplied.)

It being established that those records maintained by and within the office of the state registrar of vital statistics fall within the category of public records, it is my opinion that any effort by the State Board of Health to attempt, by the promulgation of rules and regulations, to limit the right of inspection, abstracting and procurement of certified copies thereof to certain designated parties would constitute a violation of Title 41, Sections 145-147, Code of Alabama 1940. Such statutes provide as follows:

“§145. Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.

“§146. Any public officer, having charge of any book or record, who shall refuse to allow any person to examine such record free of charge, must, on conviction, be fined not less than fifty dollars.

“§147. Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing.”

It is to be noted that these statutes grant to the citizens of the state the right to inspect and take a copy of any public writing of the state, except as otherwise expressly provided by statute. I find no limitation of such right within the statutes governing the collection, recording and preservation of those public records defined as “vital statistics.”

Such statutes also provide that those officers having the custody of public writings, which a citizen has the right to inspect, are under a duty to furnish to the citizens of the state certified copies of such records upon he payment of the fee prescribed by law.

It is, therefore, my opinion that the State Board of Health is without authority to restrict the right of inspection, abstracting and procurement of certified copies of those public records maintained by the state registrar of vital statistics to certain designated individuals and, consequently, the rules and regulations set out herein to this effect may not legally be promulgated.—Cf. Biennial Report of Attorney General 1928-30, page 771.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 29, 1947.

Hon. Phillip J. Hamm,
Commissioner of Revenue,
CAPITOL.

License Inspectors—County Boards of Equalization—

Title 51, Section 92, Code of Alabama 1940.

Deputy license inspector does not come within the purview of Title 51, Section 92, Code of Alabama 1940, and is not disqualified from being a member of the county board of equalization.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of September 25, 1947, is as follows:

"May a man who serves as deputy license inspector to a legally appointed county license inspector and who receives no fees direct from the State of Alabama but is paid by the regular license inspector by personal arrangement between the two individuals, qualify under the law to serve on the county board of equalization?"

"As I wish to complete my appointments of the members of the county boards of equalization prior to October 1, I shall greatly appreciate it if you will give me your answer to the above promptly."

In my opinion, your question should be answered in the affirmative. A deputy license inspector does not come within the purview of Title 51, Section 92, Code of Alabama 1940, and is not disqualified from being a member of the county board of equalization.

A deputy license inspector does not hold employment or an office of profit so as to come within the prohibition of Title 51, Section 92, Code of Alabama 1940, which provides as follows:

"§92. Members not to hold other governmental positions.—No member of any county board of equalization shall hold employment or office of profit with the United States, the State of Alabama, any county or other political subdivision of said state, or with any board, department or other agency of the United States, of the State of Alabama, of any county or other political subdivision of said state or with any county school board or with any municipality, while holding office as a member of said board."

A deputy license inspector is merely an appointee of the license inspector and is compensated by the license inspector from his personal

funds. He does not receive any compensation from the State or county. Cf. *Mosely v. Kennedy*, 245 Ala. 448, 17 So. 2d 536, and *Jefferson County v. Dockerty* (Ala.), 30 So. 2d 469, cert. den. (Ala.), 30 So. 2d 474.

Title 51, Section 835, subsection (g) provides, in part, as follows:

"(g) License inspectors are authorized to appoint deputies, and the acts of such deputies shall be recognized as his acts, and he shall be responsible for the same. Such deputies shall receive no compensation for their services out of the state or county revenue, except in cases as otherwise provided in this title." (Emphasis supplied.)

I find nowhere in Title 51 a different provision as to deputy license inspectors. However, should there be a provision of law authorizing the payment of state or county funds for a deputy license inspector in a particular county, such as Jefferson County (See Act No. 535, Local Acts 1939, p. 324), the holding of this provision would not be applicable to such deputy license inspector, and it is so limited.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 30, 1947.

Hon. T. E. Middlebrooks,

State Drug Inspector,

305 College Street,

Montgomery, Alabama.

Pharmacists—Title 46, Section 234, Code of Alabama 1940.

1. There is a distinction between a druggist and a dealer in druggist sundries, the former being a dealer in drugs while the latter is a merchant engaged in the business of selling all such sundries as are usually carried in a well regulated drug store, other than drugs.

2. One may, without having on duty at all times within such establishment, and in active personal charge thereof, a pharmacist duly licensed and registered by the Board of Pharmacy of the State of Alabama, entitle and advertise himself as a dealer in druggist sundries in no violation of Title 46, Section 234, Code of Alabama 1940.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of August 11, 1947, is as follows:

"There is a store operating in Dadeville, Alabama, without having placed in active personal charge and on duty at all times during business hours, a pharmacist duly registered and licensed by the Board of Pharmacy of the State of Alabama, and exhibits the following sign of title on the window of the building.

Wynn's Druggist Sundries

"It will be appreciated if you will furnish this office a ruling advising if this sign is in violation of the 1940 Code of Alabama, Chapter 12, Title 46."

It is my opinion that the displaying of the sign set out in your inquiry, under the circumstances stated therein, constitutes no violation of the statutory law governing the establishment, conduct, or operation of drug stores, pharmacies or apothecaries, as provided in Title 46, Sections 214-257, Code of Alabama 1940.

Title 46, Section 234, Code of Alabama 1940, makes the following provision relative to the operation of drug stores, pharmacies, or apothecaries and the displaying of signs or titles upon such places of business:

"It shall be unlawful for any person, firm, corporation, or co-partnership, to open or conduct a place of business, pharmacy, dispensary, drug store, apothecary shop, or store, in which drugs, medicines, or poisons are retailed, compounded and dispensed, or to stock, expose or offer for sale at retail any drugs, medicines, chemicals or poisons, except as otherwise specifically provided; or to use or exhibit the title 'drugs,' 'Drug store,' 'Drug shop,' 'Pharmacy,' or 'Apothecary,' or any combination of such words or titles, or any title or description of like import, or any other term or terms designated to take the place thereof, without placing in active personal charge and on duty at all times during business hours except for temporary absences as defined and prescribed by the board of pharmacy at each place of business a pharmacist duly registered and licensed by the board of pharmacy of this state. * * * *"

It is to be noted from the above quoted statute that it is unlawful to use or exhibit the title "drugs," "Drug store," "Drug shop," "Pharmacy," or "Apothecary," or any combination of such words or titles, or any title or description of like import, or any other term or terms designated to take the place thereof, without placing in active personal

charge and on duty at all times during business hours a pharmacist duly registered and licensed by the Board of Pharmacy of the State of Alabama. Such statute, in my judgment, is designed to prevent any person, firm, or corporation from advertising themselves to be dealers in drugs without first complying with the requirement of having on duty and in active personal charge a pharmacist duly registered and licensed by the Board of Pharmacy of the State of Alabama.

In arriving at an answer to the question presented by your inquiry, it must be determined whether the sign or title set out in your inquiry actually advertises to the public the fact that such an establishment engages in the dispensing of drugs. In my opinion, such sign or title does not so advertise such establishment to be a place of business in which drugs are compounded, stocked, retailed, exposed for sale, or dispensed.

There is a clear line of distinction recognized both by the standard lexicographers and by the courts of this State between a druggist and a dealer in druggist sundries. A druggist is commonly defined as a dealer in drugs and has been defined by the courts of this State as one whose occupation is to buy and sell drugs without compounding or preparation. *Stollenwerck v. State*, 16 Ala. App. 214, 77 So. 52.

On the other hand, a dealer in druggist sundries is no more than a merchant engaged in the business of selling all such sundries as are usually carried in a well regulated drug store, other than drugs. Such person, unless he engages in the business of compounding, dispensing, or retailing drugs or medicines, is in no sense a druggist. It is common knowledge that the modern drug store, as the term is popularly used, carries in its stock numerous and varied items other than drugs and medicines. These items, or articles of merchandise, are what are commonly known as druggist sundries. It is, therefore, easy to see that one could engage in the business of dealing in druggist sundries without in any way being a dealer in drugs, and if so engaged in the business of dealing in druggist sundries alone, it is my opinion that such person would not come within the purview of Section 234, *supra*.

The distinction between a druggist and a dealer in druggist sundries is treated by the Court of Appeals of this State in the case of *Stollenwerck v. State*, *supra*, a case involving the construction of a state statute prohibiting the keeping of open store on Sunday by merchants or shopkeepers, other than druggists, who were excepted from the operation of the statute. The court, in considering the question of whether such exception was applicable to the occupation or the individual, made the following statement:

"Many have more than one occupation, as in this case, a 'druggist' and a 'dealer in druggist sundries.' In either or both he is a merchant. In one he is protected by the exception, in the other he is not. He cannot, by uniting both lines in the same building, place both under the protection of the exception."

The establishment mentioned in your inquiry is advertised as being a place of business in which druggist sundries are sold, exhibiting the following sign or title: "Wynn's Druggist Sundries." It is apparent that such sign or title adopts none of the titles prohibited by Section 234, supra, all of which are appropriate to an establishment dealing in the compounding, dispensing, or retailing of drugs. Neither, in my opinion, is such title of like import or designed to take the place of any of the titles prohibited by Section 234, supra. As pointed out, there is a clear line of demarkation between the two professions. Those titles prohibited by Section 234, supra, are all titles applicable to establishments engaged in the business of compounding, dispensing, or retailing drugs or medicines, while the title set out in your inquiry "Wynn's Druggist Sundries" is a title applicable to those persons or firms dealing in all the many varied and sundry articles of merchandise offered for sale in the modern drug store, other than drugs. Should any person or firm, without first complying with the requirements of Section 234, supra, advertise or indicate to the public that they are authorized to engage in the business of compounding, dispensing, or retailing drugs, then such person or firm would be guilty of a violation of the provision of Section 234, supra. However, if such establishment does not advertise as being authorized to engage in the drug business, there is no violation of this statute.

Premises considered, it is my opinion that one may advertise as being a dealer in druggist sundries without first having on duty at all times and in active personal charge a pharmacist duly registered and licensed by the Board of Pharmacy of the State of Alabama. Such act constitutes no violation of the provision of Section 234, supra.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 30, 1947.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Municipal Corporations—Reinstatement—Title 37, Section 16,
Code of Alabama 1940.

The word "taxpayers" as used in Title 37, Section 16, Code of Alabama 1940, means those persons who own property within the corporate limits of such town and pay taxes thereon.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of August 1, 1947, is as follows:

"The former town of Grimes, this county, is petitioning under Title 37, Section 16, Code of Alabama 1940, to have its corporate charter re-instated, it having been dormant for a number of years.

"The question arises as to what is meant by 'Taxpayer,' as set out in this section. Some are contending that this refers only to real estate owners, while others insist that those who pay any form of taxes may be included under the provisions of this section.

"Further, there are a number of people in the area, which it is proposed to incorporate, who own property but who have not yet paid any taxes, having recently purchased such property. The question has arisen as to whether these may be considered as taxpayers under this section.

"I will appreciate your opinion on the two foregoing points.

"The petitions are before me and I will appreciate it very much if you will let this have your immediate attention."

Title 37, Section 16, Code of Alabama 1940, reads as follows:

"Dormant municipalities reinstated.—Towns or cities that have permitted their organization to become dormant and inefficient may, by a petition of a majority of the taxpayers of such town or city to the probate judge, have their corporate organization reinstated by an order of the probate judge, entered of record, and thereupon he shall appoint a mayor and councilmen for such town or city, who shall hold office until the next regular election thereafter, and until their successors are elected and qualified."

In answer to your first question, you are advised that, in my opinion, the word "taxpayer" as used in the above quoted section refers to those persons who own property within the corporate limits of the town or corporation to be reinstated, whether or not such persons are residents within the limits of such town or corporation. The Supreme Court, in the case of the *Town of Flat Creek vs. Alabama By-Products Corporation*, 245 Ala. 528, 17 So. 2d 771, had an occasion to consider the precise question proposed by you in your first inquiry.

After determining that the petition required to be filed with the probate judge by the above quoted Code Section must be signed by a

majority of the taxpayers of the town, the Court had this to say in regard to the meaning of the word "taxpayers" as used in Section 16, supra:

"* * * * Taxpayers of a town are persons who own property therein and pay taxes thereon, whether they reside within the corporate limits of the town or not. Brazeel v. Commissioner's Court, 155 Ala. 196, 46 So. 584. * * * *"

It is thus clear from the excerpt quoted from the above referred to case that taxpayers as used in Section 16, supra, means those persons who own real estate within the corporate limits of such town, whether or not such persons be bona fide residents, and does not include those persons who pay other forms of taxes. In other words, the word "taxpayers" as used in this section only refers to those persons who pay ad valorem taxes to the State and county within the territory affected.

In answer to your second question, you are advised that, in my opinion, it is immaterial whether a person who now owns property within the corporate limits of the town to be affected has paid taxes on such property or not. The controlling fact in this regard is that he is an owner of property embraced within the corporate limits of the town. He is just as much "a taxpayer" within the meaning of Section 16, supra, as any other property owner within the corporate limits of the city of Grimes.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

September 30, 1947.

Dr. Garland Weidner,
County Health Officer,
Coffee County,
Enterprise, Alabama.

County Health Officer—Isolation—Quarantine.

Under the provisions of Title 22, Sections 47 and 74, Code of Alabama 1940, the County Health Officer has authority to isolate or quarantine certain cases of tuberculosis.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of August 29, 1947, is as follows:

"We have two cases of known positive sputum tuberculosis which we are unable to control. We also have an occasional suspect who refuses to be examined.

"We are particularly interestd in one such suspect at the present time who has post tussile rales observed by the Health Officer but not reported by any other physician. The suspect has had two hemorrhages presumably from the lungs. The suspect has refused to have an x-ray. A grandchild 11 months old is now living in the home. Repeated visits by the nurse and the Health Officer have met with consistent rebuff. On August 28th the suspect ordered the Health Officer off his property.

"If the Alabama Health Code offers any protection to the public against any such individuals, please let us know."

In my opinion, you, as County Health Officer, have authority to isolate or quarantine the cases referred to in your request. If you decide to quarantine the cases, such quarantine should be established and maintained in accordance with the rules and regulations adopted by the State Board of Health for the control of tuberculosis.

Title 22, Section 47, Code of Alabama 1940, provides in part as follows:

"Notifiable diseases listed.—The following diseases and disabilities are hereby made and declared to be notifiable diseases, and occurrence of cases shall be reported as herein provided: * * * * * tuberculosis (all forms, the organ or part affected in each to be specified), * * * * *."

Title 22, Section 74, Code of Alabama 1940, provides as follows:

"Isolation and detention of cases of disease.—Whenever the state health officer or his representative, or the county health officer or his representative, shall be notified of any person or persons afflicted with any of the diseases named in section 47 of this title or having been in contact with a person or persons afflicted with any one of the diseases named in section 47 of this title, he shall at his discretion isolate or quarantine such person or persons. Such quarantine shall be established and maintained in accordance with the rules and regulations adopted by the state board of health for the control of the disease with which the person or persons is afflicted." (Emphasis supplied.)

In the future if you are forcibly resisted, or threatened with forceful resistance, in your efforts to carry out your duties as County Health Officer, I suggest that you proceed under Title 22, Section 80, Code of Alabama 1940, which provides as follows:

"Procedure in case of resistance to a health officer prescribed.— If, in the attempt to perform any duty enjoined by any public health law of the State of Alabama, or rule or regulation of the state board of health, the health or quarantine officer of a county, or his duly authorized representative, shall be forcibly resisted, or threatened with forceful resistance, such health officer shall, after conference with the county board of health, if found necessary, make affidavit before the judge of any court of record, the judge of probate, or any justice of the peace of said county, that said forceful resistance has been made, or threatened; whereupon, the officer before whom said affidavit has been made shall forthwith issue his warrant directed to the sheriff, or to any bonded constable of said county, commanding said sheriff, or constable, to remove or abate, under the direction of said health officer, said insanitary condition, or source of infection or offensive or indecent material or thing, or to remove said afflicted person; and it shall be the duty of said sheriff, or constable, to whom said warrant shall be delivered, to promptly execute the same. In executing every such warrant, the said sheriff, or constable, shall have the right to enter by force into any such lot, piece of ground, house, or vessel, or upon such pond, lake or stream."

I refer you to an opinion of this office in Biennial Report of Attorney General, 1926-1928, page 331, which holds that the Health Department of a county has authority to remove or segregate typhoid carriers. Cf. Quarterly Report of Attorney General, Vol. 29, p. 46.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

INDEX

Quarterly Report, Attorney General

Volume 48

July 1, 1947, Through September 30, 1947

Page

—A—

ACTS (GENERAL AND LOCAL)

GENERAL ACTS 1933:

Page 124	126
----------------	-----

GENERAL ACTS 1943:

Page 1	5
Page 25	247
Page 86	85
Page 217	223
Page 226	283
Page 229	147
Page 358	79
Page 400	186
Page 423, as amended	241
Page 454	289
Page 562	223
Page 596	119, 126

GENERAL ACTS 1945:

Page 58	158
Page 108	283
Page 133	180, 183
Page 145	180
Page 304	186
Page 330	150
Page 340	79
Page 472	247
Page 474	190
Page 482	164
Page 504	42
Page 531	276
Page 560	7, 13
Page 567	140, 241
Page 570	223, 249
Page 589	223
Page 590	213
Page 620	213
Page 646	27
Page 647	216
Page 666	158

INDEX

(Continued)

	Page
GENERAL ACTS 1947:	
No. 8	258
No. 181	73, 142
No. 234	99
No. 297	245
LOCAL ACTS 1931:	
Page 72	233, 253
LOCAL ACTS 1935:	
Page, 180, as amended	223
LOCAL ACTS 1939:	
Page 221	225
LOCAL ACTS 1943:	
Page 46	39
LOCAL ACTS 1945:	
Page 53	223
Page 184	207
LOCAL ACTS 1947:	
No. 11	276
No. 32	253
No. 62	233
No. 315	265

ADOPTION

County Court—Walker County—Concurrent jurisdiction with Probate Court in adoption cases	207
--	-----

AGRICULTURE AND INDUSTRIES

Cooperative Agricultural Associations—Subject to provisions of Title 2, Sections 69-84, Code of 1940	89
Gas and kerosene inspection fee—Sale to State Agency subject to	229
State Market Board projects—Road and approaches—Payment for construction	247
Warehouses—Bonds—Original, not photostatic copy, must be recorded	285
Warehouses—Corporation operating chain of—May file one bond	285

ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD

Appropriation to Commission on Education with respect to alcoholism—Calendar year basis	283
Bakery that bakes, sells or distributes fruitcakes—Manufactur- ing establishment	147
Bakery that bakes, sells or distributes fruitcakes—Purchase and transportation of liquor	147

INDEX

(Continued)

	Page
Elections—Petition to change from wet to dry county, or vice versa—Must be signed by 25% of voters in last preceding general election	14
Liquor referendum and constitutional amendment elections held same date—Separate list of qualified voters for each	106
ALABAMA POLYTECHNIC INSTITUTE	
Aviation Commission—May appropriate funds for airport development of	213
Condemnation proceedings brought by State—Costs—How paid	79
APPEALS	
Certificate of in criminal cases—Time in which clerk must file	140
Clerks of Circuit Courts—Transcript—Duties in reference to	241
Clerks—Fee for including transcript of evidence in record—Not chargeable to State	158
County Court to Circuit Court—Fees of Clerk and Sheriff	158
Court reporter—Transcript—Duties in reference to	241
Court reporter—Fee for preparing transcript of evidence—Not part of court cost	158
Transcript of record—Time within which same must be filed	140
APPROPRIATIONS	
Aviation Commission—May appropriate funds to Alabama Polytechnic Institute for airport development	213
Commission on Education—with respect to alcoholism—Calendar year basis	283
Tuberculosis Sanitarium—By county	190
ASSESSMENTS	
Boards of Equalization—Escape assessments—No authority to set aside	200
District school tax—Tax assessor not authorized to combine	196
Escape improvements—Tax assessors—No authority to assess on land assessed and taxes paid thereon	200
ATTORNEYS	
City—Duties—Matter of contract	194
AVIATION COMMISSION	
May appropriate funds to Alabama Polytechnic Institute for airport development	213
—B—	
BANKS AND BANKING	
Assignment of lease sale contract to State bank—Not subject to mortgage filing tax	142
Filing tax—Mortgage executed to State bank and National bank—Determination of amount	88

INDEX

(Continued)

	Page
Lease sale contract assigned to State bank—Subject to mortgage filing tax	142
Mortgage filing tax—Exemption from	73
BARBER COMMISSION	
Mobile County—Veterans exempt from license provided in Local Acts 1935, p. 180, as amended	223
BONDS	
Warehouses—Corporation operating chain of—May file one bond	285
BOARDS OF EQUALIZATION	
Escape assessments—No authority to set aside	200
BOARD OF REGISTRARS	
Jefferson County—Authorized to purchase card index filing system—Payable by county	197
—C—	
CHIROPRACTOR	
Person engaged in practice 2 years—Must pay license	274
CITY BOARD OF EDUCATION	
Superintendent of Schools—Contract of employment would not prevent removal for cause	123
Superintendent of Schools—May not be paid beyond termination of service	123
CLAY COUNTY	
Title 62, Section 15, Code of 1940, applicable to—unconstitutional	211
CLEBURNE COUNTY	
Title 62, Section 15, Code of 1940, applicable to—unconstitutional	211
CLERKS OF CIRCUIT COURTS	
Certificate of appeals in criminal cases—Time in which same must be filed	140
Costs—Appeal from county court to circuit court	158
Entitled to fee of \$1.00 in all probation cases	158
Ex officio Clerk of Court of Common Pleas of Elmore County— Not entitled to 5% on money collected for State	39
Fee for including transcript of evidence in record— Not chargeable to State	158
Final record—May be made any time after case is docketed and defendant arrested	264
Transcript—Duties in reference to	241
Transcript of record—Time within which same must be filed	140

INDEX

(Continued)

	Page
CODE OF ALABAMA 1940	
TITLE 2:	
Section 34	229
Sections 69-133	89
Sections 343, 344	229
Sections 433, 434	229
Sections 573, 574, 576	285
TITLE 7:	
Section 22	175
Section 214	241
Sections 273, 276	241
Sections 661, 665	50
Sections 694, 695, 697	50
TITLE 10:	
Sections 139-150	70
TITLE 11:	
Section 7	19
Section 22	39
Section 29	110
Section 83 (b), (d), (e)	158
Section 83 (d), 100	177
Section 86	116
Section 87	158
Section 90	158
Section 98, as amended	245
TITLE 12:	
Section 11	256
Section 12, as amended	13
Section 12(23)	171
Section 12, as amended	7
Section 26	136
Section 85	92
Sections 67, 68	144
Sections 124, 125	92
Section 177	262
TITLE 13:	
Section 198(9)	264
Sections 242, 245	116
Section 256	233, 276
Section 257, as amended	276
Section 261	126
Section 262	241
Section 265	119, 126
Section 267, as amended	119

INDEX

(Continued)

	Page
Section 326	158
Section 416	133
TITLE 14:	
Section 275	121
TITLE 15:	
Section 379	140
Section 393	177
TITLE 17:	
Sections 38, 40	110
Sections 54, 55	110
Section 55	106
Section 56	197
Sections 105, 112	33
Section 186	110
TITLE 19:	
Section 5	79
Section 30, as amended	79
TITLE 22:	
Section 7(6)	289
Section 8	150
Section 47	299
Section 74	299
Section 189	151
Section 192	190
TITLE 23:	
Section 43	145
Section 43	219
Section 47	227
Section 65	145
TITLE 27:	
Section 1	207
TITLE 29:	
Section 11	42
Section 68	14, 106
Section 74, as amended	147
Section 177, as amended	147
TITLE 30:	
Sections 15, 19	238
TITLE 31:	
Section 45	19

INDEX

(Continued)

	Page
TITLE 37:	
Section 16	297
Section 363	65
Section 670	175
Section 698	192
TITLE 41:	
Section 138	112
Sections 145-147	289
TITLE 42:	
Section 20, as amended	158
Section 25, as amended	158
TITLE 45:	
Section 69, as amended	158, 177
Section 115	251
Section 185	251
TITLE 46:	
Section 148	54
Sections 208, 210	138
Section 234	294
TITLE 48:	
Section 16	75
Section 18	280
Sections 104, 105, 110	280
Sections 337, 338, 339	75
TITLE 49:	
Section 49	5
TITLE 51:	
Section 2(d)	70
Section 21	200
Section 53	200
Sections 79, 80	200
Section 92	293
Section 131	200
Section 461	114
Sections 490, 491	48
Section 552	249
Section 565	274
Section 579	121
Section 613	16
Sections 618, 619	30, 73, 142
Section 619	88, 288
Section 657, as amended	219

INDEX

(Continued)

	Page
Section 713	42
Sections 752, 753	56
Section 784, as amended	85
Sections 838, 839	48
Section 840	244
Section 850	244
Sections 852-864, as amended	223

TITLE 52:

Sections 38, 39, 40	22
Section 76	260
Section 177	123
Section 207	37
Section 272	196
Section 298	99
Sections 351-361	27
Section 388	37

TITLE 54:

Section 3, as amended	173
Section 5(4)	45
Sections 9, 10, 11	45

TITLE 60:

Section 29, as amended	258
------------------------------	-----

COLBERT COUNTY

Law and Equity Court—Court reporter may serve as court reporter of Law and Equity Court—Lauderdale County	253
---	-----

CONDEMNATION

Proceedings by State to acquire land for Alabama Polytechnic Institute—Costs payable by State	79
---	----

CONFEDERATE VETERANS

Pensions—Computation of amount	258
--------------------------------------	-----

CONSTITUTION 1901

Amendment 56	104
Section 44	34
Section 68	233, 276
Section 91	169
Section 93, as amended	213
Section 94	37, 151
Section 96	276
Sections 104(24), 105	276
Section 105	173
Section 175	186
Section 212	34

INDEX

(Continued)

	Page
Section 215	211
Section 280	253
Section 281	233, 276
CONSTITUTIONALITY	
Act No. 11, Local Acts 1947, increasing salary of deputy solicitor Tuscaloosa County—Constitutional	276
Act No. 94, Local Acts 1947, increasing salary of chief deputy sheriff—Unconstitutional	173
Schools—Minimum entrance age—Act No. 234, General Acts 1947—Unconstitutional	99
Solicitor—Law and Equity Court—Lauderdale County—Act No. 62, Local Acts 1947, increasing salary—Unconstitutional	233
Statute authorizing county to hold and pay for advisory election	34
Title 62, Section 15, Code 1940, unconstitutional	211
COOSA COUNTY	
Title 62, Section 15, Code 1940, applicable to—Unconstitutional	211
CORPORATIONS	
Alabama Federation of Women's Clubs—not exempt from ad valorem taxes	70
CORRECTIONS AND INSTITUTIONS, DEPARTMENT OF	
Fees of clerk and sheriff—Appeal from county court to circuit court	158
State Market Board projects—Roads and approaches—Expenses in connection with	247
COSTS AND FEES	
Appeal from county court to circuit court	158
Circuit clerk acting as ex officio clerk of Court of Common Pleas—Elmore County—Not entitled to 5% on money collected for State	39
Clerk—Fee for including transcript of evidence in record— Not chargeable to State	158
Clerk—Probation costs—Entitled to \$1.00 fee in all probation cases	158
Court reporter—Fee for preparing transcript of evidence— Not part of court cost	158
Entering final judgment—Taxed as "cost actually created by plaintiff"	19
Inferior Court—Houston County—Created by Act No. 315, Local Acts 1947, construed generally	265
Sheriff—Guard fee—Each time prisoner lawfully committed to jail	156
Sheriff—Guard fee—Prosecution for misdemeanor on affidavit and warrant—Defender acquitted, case nol prossed or abated by death	156

INDEX

(Continued)

	Page
Sheriff—Nonsupport costs	156
Sheriff—Removing prisoner to another jail for safe keeping—	
When payable from fine and forfeiture fund	177
Solicitors—Commissions of salaried solicitors on fines and	
forfeitures—Paid into county treasury	116
Solicitor's fees on conviction in county or in inferior court—	
Paid to general fund of county	116
Solicitor's fund—Statute creating omitted from 1940 Code	116
Solicitors—Salary paid by State—Fees paid into State Treasury	116

COUNTIES

Advisory elections to test sentiment of people—not authorized	
to pay expense of in absence of statute	34
Advisory elections to test sentiment of people—Legislature may	
authorize county to hold and pay expense of	34
Annual or sick leave—County agent—No authority to pay after	
termination of employment	174
Authority to build road to privately owned radio station	145
Burglary insurance to protect county funds—	
May pay premium on	171
Christmas presents for staff of county hospital—No authority to	
spend county funds for	13
Clerk—Jury Commission—Payment for services	238
Creosoting plant project—No authority to make appropriation to	37
Engineer—Authority to contract with for employment	144
Federal tax on telegraph communications—Exempt from	195
Field notes—No authority to purchase except through Secretary	
of State	136
Former courthouse site—Authorized to sell	262
General fund—Transfer to road and bridge fund	227
Jail—Night deputy—Sheriff must appoint unless relieved by	
Department of Corrections and Institutions—Payment by	251
May borrow money to purchase road equipment pledging as	
security gasoline tax anticipation warrants	219
Municipal hospital—Authority to contribute funds for	
maintenance of	151
Office space in courthouse—May be leased when and so long	
as not needed for county purposes	7
Old age assistance—Distribution of sales tax for	85
Public roads—Abandonment by nonuser	256
Sheriff—Alcoholic beverages—Chemical analysis of—Expense	
of—When payable by county	45
Sheriff—Ferretting out crime and securing evidence—May not	
pay expense of	45
Sheriffs—Guards—Jailers—Duty to appoint—Payment by	251
Sheriff—Special investigation ordered by Circuit Solicitor,	
Attorney General or Governor—County may pay expense of	45

INDEX

(Continued)

	Page
Taxation—Property owned by exempt from taxation even if leased for profit.....	169
Temporary loans—Determination of limitations as to amount of.....	92
Temporary loans—"One-half of the income of said county for the preceding year" defined.....	92
Tuberculosis Sanitarium—Appropriation to.....	190
Winston—Highway Board—No authority to pay secretary additional compensation.....	225
COUNTY BOARDS OF EDUCATION	
No authority to employ counsel to represent county school bus driver.....	260
COUNTY BOARDS OF EQUALIZATION	
Deputy license inspector—May be member of.....	293
COUNTY COURTS	
Walker County—Adoption cases—Concurrent jurisdiction with the probate court.....	207
COUNTY ENGINEER	
Authority of county to contract with for employment.....	144
COURTHOUSES	
Former site—County authority to sell.....	262
Office space in—May be leased when and so long as not needed for county purposes.....	7
COURT REPORTERS	
Fee for preparing transcript of evidence—Not part of court costs.....	158
Law and Equity Court—Lauderdale County—May serve as reporter for Law and Equity Court of Colbert County.....	253
Official—Special—Neither office of profit.....	126
Official—When not discharging duties may serve as special reporter in another judicial circuit—Entitled to compensation.....	126
Special—not entitled to traveling and living expenses.....	119
Transcript—Duties in reference to.....	241
COURTS	
Sunday—No authority to hold on.....	134
COURTS OF COUNTY COMMISSIONERS	
Annual or sick leave—County agent—No authority to pay after termination of employment.....	174
Authority to build road to privately owned radio station.....	145
Burglary insurance to protect county funds— May pay premium on.....	171
Christmas presents for staff of county hospital—No authority to spend county funds for.....	13
Clerk—Jury Commission—Payment for services.....	238

INDEX

(Continued)

	Page
County Engineer—Authority of county to contract with for employment	144
Creosoting plant project—No authority to make appropriation to	37
Federal tax on telegraph communication—Exempt from	195
Field notes—No authority to purchase except through Secretary of State	136
Former courthouse site—Authorized to sell	262
General fund—Transfer to road and bridge fund	227
Jail—Night deputy—Sheriff must appoint unless relieved by Department of Corrections and Institutions—Payment by	251
May borrow money to purchase road equipment pledging as security gasoline tax anticipation warrants	219
Municipal hospital—Authority to contribute funds for maintenance of	151
Office space in courthouse—May be leased when and so long as not needed for county purposes	7
Public roads—Authority to discontinue	256
Sheriffs—Guards—Jailers—Duty to appoint—Payment by	251
Temporary loans—Determination of limitations as to amount of	92
Temporary loans—"One-half of the income of said county for the preceding year" defined	92
Tuberculosis Sanitarium—Appropriation to	190

—D—

DEPARTMENT OF REVENUE

Boards of Equalization—Escape assessment—No authority to set aside	200
--	-----

—E—

EDUCATION, STATE BOARD OF

Charitable trusts—Condition of grant and use of funds may not be altered	22
--	----

ELECTIONS

Advisory—To test sentiment of people—County not authorized to pay expense of in absence of statute	34
Advisory—To test sentiment of people—Legislature may authorize county to hold and pay expense of	34
Constitutional amendments and liquor referendum elections held same day—Separate lists of qualified voters for each	106
List of qualified voters—Clerical help may be employed by Judge of Probate for preparation of each list	106
List of qualified voters—Judge of Probate may employ clerical assistance to prepare	110
List of qualified voters—Judge of Probate not entitled to compensation for preparing	110

INDEX

(Continued)

	Page
List of qualified voters—New list must be prepared for elections in 1947—Publication not necessary.....	110
Petition to change from wet to dry county, or vice versa—Must be signed by 25% of voters in last preceding general election.....	14
Poll tax not paid before February 1—Person not qualified elector.....	118
Supplies—Requisition by Judge of Probate.....	110
Voting machines—Appointment of returning officer not necessary.....	33
 ELMORE COUNTY	
Circuit Clerk acting as ex officio clerk of Court of Common Pleas—Not entitled to 5% on money collected for State.....	39
 EMPLOYEES' RETIREMENT SYSTEM	
Funds of deceased employees—If set aside as exempt from administration—May be paid to widow of decedent.....	50
 ENGINEERS AND LAND SURVEYORS	
Licenses—Board authorized to enter into reciprocity agreements with other states in reference to.....	54
 EMINENT DOMAIN	
Proceedings by State to acquire land for Alabama Polytechnic Institute—Costs payable by State.....	79
 EXEMPTIONS	
Alabama Federation of Women's Clubs—Not exempt from ad valorem taxes.....	70
Counties—Municipalities—Property owned by exempt from taxation even if leased for profit.....	169
Federal tax on telegraph communications—Counties exempt from.....	195
Gasoline and kerosene inspection fees—Sale to State agency not exempt from.....	229
Licenses—Physicians.....	249
Mortgage filing tax—Banks.....	73
Veterans exempt from barber license provided in Local Acts 1935, p. 180, as amended.....	223
 FILING TAX	
American National Red Cross—Subject to.....	222
Assignment of lease sale contract to State bank—Not subject to.....	142
Deed—Mortgage—Where deed recites consideration secured by purchase money mortgage.....	30
Lease sale contract assigned to State bank—Subject to.....	142
Mortgage—Banks—Exemption from.....	73

INDEX

(Continued)

	Page
Mortgage executed to State bank and National bank—	
Determination of amount.....	88
Mortgage—Extension agreement—Subject to.....	288
FINE AND FORFEITURE FUND	
Sheriffs—Fees for removing prisoner to another jail for safe-keeping—when payable from.....	177
—G—	
GAMING	
Punchboard is lottery—If operated tax must be collected.....	121
GOVERNOR	
Notary Public—State at Large—May not remove from office.....	186
—H—	
HEALTH AND HEALTH DEPARTMENT	
County Board of Health—No authority to establish, own, or operate hospitals	150
County Health Officer—Authorized to isolate or quarantine certain tuberculosis cases.....	299
Public records—Bureau of Vital Statistics—Rules and regulations in respect to.....	289
Tuberculosis Sanitarium—Appropriation to.....	190
HIGHWAYS AND HIGHWAY DEPARTMENT	
State Market Board projects—Roads and approaches—Expenses in connection with.....	247
HOSPITALS	
County Board of Health—No authority to establish, own or operate	150
Municipal—Authority of county to contribute funds for maintenance of	151
HOUSTON COUNTY	
Inferior Court—Act No. 315, Local Acts 1947, construed generally.....	265
—I—	
INFERIOR COURTS	
Law and Equity Court—Lauderdale County—Court reporter may serve as court reporter for Law and Equity Court	
Colbert County	253
INSURANCE	
Burglary—To protect funds of county—County may pay premium on	171

INDEX

(Continued)

	Page
Interstate rates—Discriminatory	183
Order changing rate applicable only on or after effective date of order	180
Supervisor of Rates—No authority to give retroactive effect to order changing rate	180
INTOXICATING LIQUORS	
Bakery that bakes, sells or distributes fruitcakes— Manufacturing establishment within meaning of ABC Law	147
Bakery that bakes, sells or distributes fruitcakes—Purchase and transportation of	147
—J—	
JEFFERSON COUNTY	
Board of Registrars—Authorized to contract for card index filing system—Payable by county	197
JUDGES OF PROBATE	
Constitutional admendments and liquor referendum elections held same day—Separate lists of qualified voters for each	106
Elections—Lists of qualified voters—Clerical help may be employed by for preparation of each list	106
Election supplies—Requisition by judge of probate	110
List of qualified voters—May employ clerical help to prepare	110
List of qualified voters—New list must be prepared for elections in 1947—Publication not necessary	110
JURORS AND JURIES	
Clerk—Jury Commission—Payment for services	238
Grand—Mileage	245
Petit—Entitled to mileage only one time in attending session of court	245
JUSTICES OF THE PEACE	
Jurisdiction—Violation of rules of the road	133
—L—	
LAUDERDALE COUNTY	
Law and Equity Court—Court reporter may serve as Court reporter for Law and Equity Court—Colbert County	253
Solicitor—Law and Equity Court—Act No. 62, Local Acts 1947, increasing salary—Unconstitutional	233
LEGISLATURE	
Statute authorizing county to hold and pay for advisory election—Constitutional	34
Tourist camps—Act regulating under police power of State	68

(Continued)

INDEX

	Page
LICENSE INSPECTORS	
Deputy—May be on county Board of Equalization.....	293
LICENSES	
Auctioneers—Only one State license required—License in each county	114
Business commenced after April 1.....	244
Dealer who also manufactures coffins—Liable for licenses on both businesses	48
Osteopaths—Chiropractors—Person engaged in practice 2 years—must pay license	274
Physicians—Exemption from	249
Vending Machines—Levied on operator, not on machine itself	16
Vending Machines—Should show place where operated, not address of owner	16
Vending Machines—Substituting new machine for old machine.....	16
Veterans exempt from barber license provided in Local Acts 1935, p. 180, as amended.....	223
LOTTERIES	
Punchboard is lottery—If operated tax must be collected.....	121
—M—	
MUNICIPALITIES	
Citizens of Auburn—Acquire no hunting or fishing rights under agreement considered	31
City attorney—Duties—Matter of contract.....	194
Election held under constitutional amendment ratified November 14, 1946.....	104
Hospitals—Authority of county to contribute funds for maintenance of	151
Mobile—Fireman—Injured playing ball during recreation.....	167
Roads and streets in corporate limits of—Expenditure of public funds for maintenance and improvement of.....	42
Taxation—Property owned by exempt from taxation even if leased for profit.....	169
Taxes—Action to recover may be brought within five years after delinquency	175
Taxes assessed on or after April 15—Due and delinquent on and after October 1.....	192
Taxes—Authority to levy under constitutional amendment ratified November 14, 1946.....	104
“Taxpayer”—Person owning property within corporate limits of town and paying taxes thereon.....	297
Water works—May furnish water to inhabitants of territory surrounding corporate limits.....	65

INDEX

(Continued)

	Page
MOBILE COUNTY	
Fireman—Injured playing ball during recreation period.....	167
—N—	
NOTARY PUBLIC	
Must be qualified elector.....	118
State at Large—Removal from office by impeachment only.....	186
NURSES	
Application for license—Time for filing.....	164
License—When payable	164
—O—	
OFFICERS AND OFFICES	
Notary Public—Must be qualified elector.....	118
Notary Public—State at Large—Removal from office by impeachment only	186
OPINIONS OVERRULED, MODIFIED AND DISTINGUISHED	
Quarterly Report, Vol. 19, p. 44.....	16
OPTOMETRISTS	
Exemptions of surgeons, physicians, etc.—Does not extend to store or business establishment.....	138
Store where eyes are examined and glasses fitted—must be in charge of licensed optometrist.....	138
OSTEOPATHS	
Person engaged in practice 2 years—Must pay license.....	274
—P—	
PARDON, PAROLE & PROBATION	
Clerk—Entitled to fee of \$1.00 in all probation cases.....	158
PHARMACISTS	
Person may advertise himself as a dealer in “druggist sundries” without having registered pharmacist in charge.....	294
PHYSICIANS	
License—Exemption from	249
POLL TAX	
Not paid before February 1—Person not qualified elector.....	118
PROBATE COURT	
Adoption cases—Concurrent jurisdiction with County Court of Walker County	207

INDEX

(Continued)

	Page
PUBLIC SAFETY DEPARTMENT	
Justices of the Peace—Jurisdiction—Violation of rules of the road.....	133
PUBLIC SERVICE COMMISSION	
Capital stock—Public utilities and motor carriers—Transfer of subject to approval of.....	75
Railroad changing straight passenger service to "mixed train" must obtain prior authorization.....	280
PUBLIC WELFARE	
Counties—Old age assistance—Distribution of sales tax for.....	85
Old age assistance—Hospitalization—Grant in excess of maximum assistance	5

—R—

RAILROADS	
Changing straight passenger service to "mixed train" must obtain prior authorization of Public Service Commission.....	280
REGISTERS	
Public funds deposited to credit of deceased—May be withdrawn by qualified successor.....	112
ROADS AND BRIDGES	
Public roads—Abandonment by nonuser.....	256
Public roads—Authority of county governing body to discontinue.....	256

—S—

SALES TAX	
Building materials sold to contractors for resale or use in the form of real estate—Subject to.....	56
Counties—Old age assistance—Distribution of.....	85
SCHOOLS	
Charitable trusts—State Board of Education as trustee under deed—May not alter condition of grant and use of funds.....	22
City Superintendent of Education—Contract of employment would not prevent removal for cause.....	123
City Superintendent of Schools—May not be paid beyond termination of service.....	123
County Board of Education—No authority to employ counsel to represent county school bus driver.....	260
Creosoting plant project—County may not make appropriation to.....	37
District school tax—Tax assessor not authorized to combine.....	196
Minimum entrance age—Act No. 234, General Acts 1947—Unconstitutional	99

INDEX

(Continued)

	Page
State Textbook Committee—Payment of per diem to.....	216
Teachers—Continuing service status—How obtained.....	27
Teachers—Resignation—Refusal to accept salary according to law—Effect on continuing service status.....	27
 SHERIFFS	
Alcoholic beverages—Chemical analysis of—Expense of— When payable by county.....	45
Chief deputy—Tallapoosa County—Act No. 94, Local Acts 1947, increasing salary of—Unconstitutional.....	173
Costs—Appeal from county court to circuit court.....	158
Costs—Nonsupport cases	156
Fees—Removing prisoner to another jail for safekeeping— when payable from fine and forfeiture fund.....	177
Ferretting out crime and securing evidence—County may not pay expense of.....	45
Guard fee—Each time prisoner lawfully committed to jail.....	156
Guard fee—Prosecution for misdemeanor on affidavit and warrant—Defender acquitted, case nol prossed or abated by death	156
Guards—Jailers—Duty to appoint—Payment by county.....	251
Jail—Night deputy—Must appoint unless relieved by Department of Corrections and Institutions—Payment by county	251
Special investigation ordered by Circuit Solicitor, Attorney General or Governor—County may pay expense of.....	45
Special investigation ordered by Circuit Solicitor, Attorney General or Governor—Entitled to five cents per mile on private automobile	45
 SOLICITORS	
Commissions of salaried solicitors on fines and forfeitures— Paid into county treasury.....	116
Deputy—Does not hold "term of office" within meaning of Constitution 1901, Sections 68, 281.....	276
Deputy—Tuscaloosa County—Act No. 11, Local Acts 1947, increasing salary of—Constitutional.....	276
Fees on conviction in county or inferior court—Paid to general fund of county.....	116
Law and Equity Court—Lauderdale County—Act No. 62, Local Acts 1947, increasing salary—Unconstitutional.....	233
Salary paid by State—Fees paid into State Treasury.....	116
Solicitor's fund—Statute creating omitted from 1940 Code.....	116
 STATE	
Condemnation proceedings to acquire land for Alabama Polytechnic Institute—Costs payable by State.....	79

INDEX

(Continued)

	Page
Tourist camps—authority to regulate under police power of State	68
STATUTES	
Act No. 11, Local Acts 1947, increasing salary of deputy solicitor—Tuscaloosa County—Constitutional	276
Act No. 62, Local Acts 1947, increasing salary of solicitor, Law and Equity Court, Lauderdale County—Unconstitutional	233
Act No. 84, Local Acts 1947, increasing salary chief deputy sheriff—Unconstitutional	173
Act No. 234, General Acts 1947—Unconstitutional	99
Title 62, Section 15, Code 1940, unconstitutional	211
Tourist camp—Act regulating under police power of State	68
SUNDAY LAWS	
No authority to hold court on	134
—T—	
TALLAPOOSA COUNTY	
Chief deputy sheriff—Act No. 94, Local Acts 1947, increasing salary—Unconstitutional	173
TAX ASSESSORS	
District school tax—No authority to combine	196
Escape improvements—No authority to assess on land assessed and taxes paid thereon	200
TAXATION	
Alabama Federation of Women's Clubs—Not exempt from ad valorem taxes	70
Boards of Equalization—Escape assessment—No authority to set aside	200
Counties—Municipalities—Property owned by exempt from taxation even if leased for profit	169
District school tax—Tax assessor not authorized to combine	196
Escape assessments—Tax assessors—No authority to assess on land assessed and taxes paid thereon	200
Federal tax on telegraph communications—	
Counties exempt from	195
Filing tax—American National Red Cross—Subject to	222
Filing tax—Assignment of lease sale contract to State bank—	
Not subject to	142
Filing tax—Deed—Mortgage—Where deed recites consideration secured by purchase money mortgage	30
Filing tax—Lease sale contract assigned to State bank—	
Subject to	142

INDEX

(Continued)

	Page
Filing tax—Mortgage executed to State Bank and National bank—Determination of amount.....	88
Filing tax—Mortgage—Extension agreement—Subject to.....	288
Licenses—Auctioneers—Only one state license required—	
License in each county.....	114
Licenses—Dealer who also manufactures coffins—Liable for license on both businesses.....	48
Licenses—Vending machines—Levied on operator, not on machine itself.....	16
Licenses—Vending machines—Should show place where operated, not address of owner.....	16
Municipalities—Authority to levy taxes under constitutional amendment ratified November 14, 1946.....	104
Municipalities—Election held under constitutional amendment ratified November 14, 1946.....	104
Municipalities—Taxes—Action to recover may be brought within five years after delinquency.....	175
Municipal—Taxes assessed on or after April 15—Due and delinquent on and after October 1.....	192
Punchboard—Lottery—If operated tax must be collected.....	121
Sales tax—Building materials sold to contractors for resale or use in form of real estate—Subject to.....	56
 TEACHERS	
Continuing service status—How obtained.....	27
Resignation—Refusal to accept salary according to law—	
Effect on continuing service status.....	27
 TOURIST CAMPS	
Authority of State to regulate under police power.....	68
 TUSCALOOSA COUNTY	
Deputy solicitor—Act No. 11, Local Acts 1947, increasing salary of—Constitutional.....	276
 —U— 	
U. S. C. A.	
Title 26, Sections 3465 and 3466.....	195
Title 42, Section 303.....	5
 —V— 	
VETERANS	
Confederate—Pension—Computation of amount.....	258
Exempt from barber license provided in Local Acts 1935, p. 180, as amended.....	223
Physicians—Exemption from license.....	249

INDEX

(Continued)

	Page
VOTERS	
List of qualified voters—Judge of Probate may employ clerical assistance to prepare.....	110
List of qualified voters—Judge of Probate not entitled to compensation for preparing.....	110
List of qualified voters—New list must be prepared for elections in 1947—Publication not necessary.....	110
Poll tax not paid before February 1—Person not qualified elector	118
VOTING MACHINES	
Returning officer—Not necessary to appoint.....	33
—W—	
WALKER COUNTY	
County court—Adoption cases—Concurrent jurisdiction with the probate court.....	207
WASHINGTON COUNTY	
Title 62, Section 15, Code 1940, applicable to—Unconstitutional.....	211
WINSTON COUNTY	
Highway Board—No authority to pay secretary additional compensation	225
Title 62, Section 15, Code 1940, applicable to—Unconstitutional.....	211

